No. 2

KARNATAK UNIVERSITY
EXTENSION LECTURES SERIES

THE HINDU CODE BILL

By
JUSTICE
GAJENDRAGADKAR

Price Rs. 2/-

...res delivered by the Hon'ble Mr. Justice ...kar under the auspices of the Karnatak ...t Dharwar on the 12th and 13th April, 1951).

INTRODUCTION

The Hindu Code Bill is before the public for a number of years. It has been the subject-matter of warm controversy both on the floor of the Parliament and outside in the Country at large. As it did not seem to have attracted much attention of the public in Karnatak, several prominent members of the Senate and Syndicate of the Karnatak University requested me to arrange a few lectures in our University Extension Lectures Series, on the Hindu Code Bill by an expert in that branch of law.

As the primary responsibility of a University is not merely to convey the factual information but also to stimulate the spirit of inquiry and criticism, I fell in with the idea, and requested my friend, the Hon'ble Shri Justice P. B. Gajendragadkar to deliver a set of two lectures on the proposed Hindu Code Bill, at Dharwar.

These lectures were delivered at Dharwar in the Lingayat Town Hall, which was packed to suffocation by the elite of Dharwar, Hubli and other parts of Karnatak. At the end of the lectures, the members of the audience were invited to put questions to the distinguished Lecturer and the members took full advantage of that privilege. It is needless to say that the lectures were much appreciated by the members of the public and the Karnatak University Authorities have reason to be satisfied that their object in arranging these lectures was more than satisfied.

As the lectures are found to have an appeal to a wider public, at this juncture when the Hindu Code Bill is on the anvil, the Karnatak University decided to publish them under its own auspices. This may be regarded as the contribution of the Karnatak University to the discussion of the principles involved in the Hindu Code Bill.

The Karnatak University acknowledges its deep obligation to Hon'ble Shri Justice P. B. Gajendragadkar for having agreed to deliver the said lectures.

R. A. Jahagirdar,
Vice-Chancellor,
Karnatak University.

Dharwar,
July 16, 1951.

Mr. Vice-Chancellor and Friends

I deem it a privilege to have been requested to deliver two lectures on the Hindu Code under the auspices of your University in the series of extension lectures which your University has recently started. I must confess that when I received the invitation I felt some hesitation in accepting it. The Hindu Code Bill which is before the Indian Parliament at present has become the subject-matter of a warm controversy both on the floor of the House and outside in the country at large, and I wondered whether it would be proper for me to take part in this controversy. I realise that Judges should conform to the very salutary and healthy convention that they must not take part in the public discussion of purely political issues or any other matters of controversy which are likely to come before them for judicial decision. In the modern democratic state the functions of the legislature, the executive and the judiciary are well defined and the spheres of their activities well marked. It is obvious that the progress and stability of a modern democratic state depends upon the wisdom and the foresight of its legislature, the efficiency and incorruptibility of its executive and the independence, impartiality and integrity of its judiciary. These three constituents of the modern state must function within their respective spheres with mutual respect for each other. It is true that the Indian Constitution has enjoined upon the High Courts and the Supreme Court to safeguard the fundamental rights of the Citizens of this nation, and in discharging their duties in that behalf the Judges of the High Courts and the Supreme Court would have occasion to consider the validity of all legislation which affects the citizens' fundamental rights. Often enough the validity or legality of executive orders purporting to be passed under statutory authority conferred upon the executive has also to be considered by these Courts. But it is necessary to remember that even in these matters the executive and the judiciary are both acting within their respective spheres as servants of the State. It is also necessary to emphasise that if judicial interpretation of laws sometimes results in expressions of disapproval of the conduct of or orders passed by the executive or of the provisions contained in certain impugned legislative enactments, it is inaccurate and even unjust to describe the position as one of conflict between the judiciary and the executive or legislature. But barring these cases, normally and ordinarily Judges are not concerned with the policy underlying legislation ; it is their duty to interpret and administer the law

as it stands. It may be that in some cases the policy underlying the law may not appeal to the Judges individually ; but it is of the essence of judicial strength and integrity that a Judge must never allow his personal bias to affect his judgment in Court. That is why in all countries where the democratic way of life prevails Judges voluntarily impose upon themselves certain restraints. In the first few years of our freedom it is of paramount importance that all persons holding high public offices should by their conduct and their speech set a model to the rest of the country. The responsibility of the Judges in this behalf is undoubtedly very great. It would, therefore, normally be my duty not to enter into any public controversy about the Hindu Code ; but it seems to me that by inviting me to deliver the present lectures it is not your object to start any controversy on the subject at all. I have no doubt that the Karnatak University has offered the invitation to me to deliver the present lectures solely with a view to encourage its students to study the problems raised by the Hindu Code cooly and dispassionately. I should, therefore, like to make it clear that I have accepted the invitation in the same spirit. The questions posed by the Hindu Code are of great importance to millions of Hindus in this country and it is necessary that they should be considered in their proper perspective in the spirit of scientific inquiry. Dogmatic assertiveness would be clearly inconsistent with the spirit of scientific inquiry. I am aware that on some of the questions which I will discuss two views are possible, and so while expressing my views I will never expect that they should be accepted by you as true or correct without close examination. It is hardly necessary to add that Judges do not cease to be citizens and as citizens it is open to them to take part in social, educational or cultural activities. I hope it would not be disputed that Judges can legitimately take active part in discussing questions of social or educational reform or in helping all cultural activities whose aim is to make the nation's cultural life healthier, broader and richer. I apprehend it would be setting a very poor ideal before a Judge to expect that he should be a Judge and nothing more. I am, therefore, proceeding with my discussion on the Hindu Code on the basis that I am addressing an educational gathering of students of Hindu law and of Hindu social reformers who are determined to study the Hindu Code in a spirit of scientific inquiry.

Now, before we consider the changes which the Hindu Code proposes to make in the Hindu law as it is administered today, it is necessary first to address ourselves to the question as to whether the Hindu Code is necessary at all. This question can be best discussed if we first understand the historical development of Hindu law before and during the British rule. The Sanskrit word *dharma*, which generally

speaking stands for law, cannot easily be defined or even interpreted. The history of ancient Sanskrit literature shows that the shades of meaning attached to this word have changed from time to time. As pointed out by Dr. Kane* this word occurs at least 56 times in the Ṛgveda, which is the most ancient Sanskrit text available. As used in the Ṛgveda it is clearly derived from the root *dhṛ* (to uphold, to support, to nourish). In some passages it denotes the upholder or the supporter or the sustainer. Curiously enough this word is used more frequently in the neuter gender in the Ṛgveda ; it is used in the masculine gender just once or twice. In a majority of passages where this word occurs in the Ṛgveda it seems to indicate religious ordinances or rites. In the Atharvaveda many of the Ṛgvedic verses are quoted, but on the whole the meaning of the word *dharma* as used in this Veda seems to be 'merit acquired by the performance of religious rites'. The Aitareya-brāhmaṇa uses the word abstractly in the sense of 'the whole body of religious duties'. During the period of the Upanisads the concept of *dharma* came to be expressed in greater detail and its threefold character was discussed : The *dharma* of the student who was practising celibacy and was living with his teacher for the study of the Vedas, the *dharma* of the householder consisting of the performance of the rituals and of acts of charity, and the *dharma* of the hermit consisting of the performance of the acts of austerities. This classification corresponded with the division of human life into different *asramas.* The word *dharma* sometimes denotes the literature on *dharma* itself. Both Manu and Yājñyavalkya refer to *dharma* as comprising of the duties and obligations of the different *varṇas.* The division of society into four *varṇas* was then an essential feature of the Hindu social life. This word as thus used by Manu and Yājñyavalkya has been interpreted by Medhatithi to be fivefold in character. It consists of the *varṇadharma*, the *asrama-dharma*, the *varṇasrama-dharma*, the *ṇaimittikādharma* and the *guṇadharma.* It is not surprising that in the later works on *dharma* numerous topics came to be discussed. The *Mīmānsākās* and the Vāisesikās put their own interpretations upon the word *dharma.* Jaimini for instance holds that the word *dharma* means "a desirable goal or result that is indicated by injunctive passages in the vedas;"† in other words, according to this conception *dharma* would consist of the performance of Vedic rites, because it is such performance that leads to human happiness in this world and in heaven. The Vāisesikās school defines *dharma* as 'that from which happiness and final beatitude follow.‡

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* History of Dharmasastra, Vol. I, p. 1.

† चोदनोलक्षणोर्थो धर्मः। पू. मी. सू. I, 1. 2.

‡ यतोभ्युदयनिःश्रेयससिद्धिः स धर्मः। वैशेषिकसूत्र

It would thus appear that the modern notion of law that it is the command of a sovereign was vitually unknown to the ancient Sanskrit texts on *dharma*. In the vast literature of Hindu law we do not find any trace of the notion of positive or secular law as such and there is no recognition of the idea that such law is a human institution, started and modified from time to time by rulers or legislatures. The Satapatha Brāhmaṇa eloquently describes the majesty of law by saying : " Law is the king of kings, far more powerful and rigid than they : nothing can be mightier than law, by whose aid, as by that of the highest monarch, even the weak may prevail over the strong."* Even the ruling monarch in those ancient times was not apparently held to be competent to make new laws or to modify the old. For in his chapter dealing with the duties of kings Manu provides for minute rules for the guidance of the king and he ordains that the principal duty of the king is to administer justice according to local usage and consistently with the written codes and to inflict punishment on all those who act unjustly. It is remarkable that though several minute details are described in Chapter VII, Manu has not indicated that legislation was the function of the king. Yājñyavalkya who came much later than Manu no doubt divides *Dharma Sāstra* into *Āchāra* or ritual, *Vyavahāra* or jurisprudence and *Prayaschitta* or expiation, which on the whole constitutes an improvement on the method adopted by Manu. But even with Yājñyavalkya the distinction between the religious and secular aspects of *dharma* is not always or clearly emphasised. On the whole I think it would not be wrong to say that in the earliest stages Hindu law was regarded as consisting of commands issued, not by a political sovereign or by any legislature, but by the Supreme Ruler of the Universe, and ancient Hindu literature on *dharma* seems to be agreed that it was the imperative duty of the political sovereign to enjoin the divine commands and to enforce obedience to them by his subjects. As Gooroodass Banerjee in his lectures on the Hindu Law of Marriage and Strīdhana observes : " The highest possible ambition of every Hindu ruler was to govern according to primeval law ; and the most perfect type of administrative ability, which the imagination of the Hindu poet could conceive, was the power to lead the subjects, without the least deviation, in the beaten track marked out by Manu."† I must, however, add that this feature is not unique to Hindu Law, because it appears to be common to ancient laws in most of the countries. Sir Henry Maine in his " Ancient Law " has pointed out that " the earliest notions connected with the conception, now so fully developed, of a law or rule of life are those contained in the Homeric words " Themis " and " Themistes." . . . .It is now clearly seen by all trustworthy observers

* Sa. Br. 14, 4, 2, 23 ; Bri. Ar. Up. 1, 4, 14.

† Page 3.

of the primitive condition of mankind that, in the infancy of the race, men could only account for sustained or periodically recurring action by supposing a personal agent. . . .As in the physical world, so in the moral. When a king decided a dispute by a sentence, the judgment was assumed to be the result of direct inspiration. The divine agent, suggesting judicial awards to kings or to gods, the greatest of kings, was *Themis*. . . .*Themistes*, Themises, the plural of Themis, are the awards themselves, divinely dictated to the judge."* Thus the notion of positive law as elaborately developed by Bentham and Austin has no counterpart in the primitive laws of all countries. We do not find law treated as a command of the lawgiver, an obligation imposed thereby on the citizen, and a sanction threatened in the event of disobedience, as postulated by Austin. No doubt, the obedience even to ancient laws was based on fear; but it was the fear of Divine Displeasure. The thesis which Maine has developed in his " Ancient Law " shows that the historical era of aristocracies succeeded the historical era of heroic kings and the epoch of divine law was followed by the epoch of customary law which was in the custody of the privileged order. This order which consisted of a privileged minority became the custodian of law and its exponents. In India this privilege was exercised by the religious leaders of the communities consisting of the learned Brahmins. It was inevitable that in the course of time changes had to be made in the secular part of law, because customs never remained static or immutable; but these changes were always introduced by means of different rules of construction; the attempt always was to treat the foundational texts of Hindu law as being of paramount authority.

All texts on *dharma* agree more or less in treating the Veda as the first and foremost source of authority. The Gautama-dharmasūtra, says ' the Veda is the source of *dharma* and the tradition and practice of those who follow it.'† So does Apastamba provide that ' the authority (for the *dharmas*) is the consensus of those that know *dharma* and the Vedas.'‡ Manusmṛti makes a departure, because according to Manu there are five different sources of dharma. The whole Veda is the first source of *dharma*, then comes the tradition and practice of those that know it, and then follow the usages of virtuous men and self-satisfaction.§ The sources of *dharma* as declared by Yājñyavalkya are more familiar to the students of Hindu law today. Yājñyavalkya

* " Ancient Law " by Sir Henry Sumner Maine, pp. 3-4.

† वेदो धर्ममूलम् । तद्विदां च स्मृतिशीले । गौ. ध. सू. I. 1. 2.

‡ धर्मज्ञसमयः प्रमाणं वेदाश्च । आप. ध. सू. I. 1.1.2.

§ वेदोऽखिलो धर्ममूलं स्मृतिशीले च तद्विदाम् ।
आचारश्चैव साधूनामात्मनस्तुष्टिरेव च ।। मनुंस्मृति II, 6.

says : " The Veda, traditional lore, the usages of good men, what is agreeable to one's self and desire born of due deliberation—this is traditionally recognised as the source of *dharma*."* It would thus be clear that the Veda is treated as of the highest authority in the matter of *dharma*. Dr. Kane has collected together all the references in the Ṛgveda which deal with the secular aspect of *dharma*. He has found about fifty passages that incidentally refer to marriage, forms of marriage, different kinds of sons, adoption of a son, partition, inheritance, *śrāddha* and *stridhana*. It must, however, be added that no passage in the Ṛgveda deals directly with any of the matters that fall for dicussion under the secular aspect of law. These passages contain only incidental references which would assist the student in ascertaining the social conditions at the time when the particular hymns were composed. Some of the traditions based on social usages which are mentioned in these passages are about the only basis on which indirectly some reliance can be placed for the purpose of the study of Hindu law. It would, however, not be wrong, to say that the whole of the Vedic literature does not afford any assistance in dealing with the secular aspect of Hindu law.

The *gṛhyasūtras* and the *dharmasūtras* that followed the Vedic period were also concerned to deal with questions of the sacred domestic fire, the divisions of Grhya sacrifices, the regular morning and evening oblations and other rituals and *saṁskāras* which governed the Hindu life. As Dr. Kane points out, in most cases the Grhyasitras confine themselves principally to the various events of domsetic life ; they rarely give rules about the conduct of men, their rights, duties and responsibilities. The *dharmasūtras* also contain rules on some of the said topics such as marriage and the *saṁskāras*, and the rules for Brāhmacārya, *snatakas* and holidays, on *śrāddha* and *madhūpārka*. These *dharmasūtras* generally do not describe the ritual of domestic life as the *gṛhyasūtras* do. The scope of the *dharmasūtras* is much wider. Their object appears to be to deal with the rules of conduct, law and custom. But even as to these *sūtras*, it cannot be said that they give a consistent or a connected account of the provisions of the secular part of *dharma*. We no doubt find valuable statements scattered from place to place which touch the problems of secular law ; but these statements form a very small portion of the topics dealt with by them.

The sutra period is followed by the metrical *smṛtis* and amongst them Manu and Yājñyavalkya are the most important. Between the

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* श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।
सम्यक्सङ्कल्पजः कामो धर्ममूलमिदं स्मृतम् ।। याज्ञ. I. 7.

two Yājñyavalkya deals with the topics concerning the secular part of *dharma* more precisely and the distinction between the religious and the secular is more clearly brought out by him. Several other *smṛtis* were written during this period, such as that of Narada ; but the ground covered by them is almost the same as that by Manu and Yājñyavalkya. In the development of the religious part of *dharma* the epics such as the Mahābhārata and the Rāmāyana have played an important part ; but these epics are of no assistance to the students of Hindu law because they do not deal with the theory of the secular law at all. The *smṛtis* in their turn were followed by commentators and it is really the commentators that were ultimately treated as the important source of Hindu law in the pre-British period in India. Amongst the commentators of Manu, Medhatithi is the most important, while Vijñāneśvara is the outstanding commentator on Yājñyavalkya. The age of commentators was followed by the age of writers of treatises on Hindu law. Amongst these must be mentioned Jimutāvāhāna, the author of Dāyabhāga, Nandapandita, the author of Dattākamimāṁsa and Dattākacandrika, Kamalākarabhatta, the author of Nirṇayasindhu, Nīlakaṇṭha, the author of Vyavahāramayukha, and Kāsinatha, the author of Dharmasindhu.

It would be very interesting to consider very broadly the period covered by these different works on Hindu law. It is well-known that chronology is the weakest part of the history of Hindu culture. All students of ancient Sanskrit literature are aware that the task of fixing the dates of Sanskrit texts whether of *dharma* or of any other branch is beset with insurmountable difficulties. Biographical material about the authors is rarely available and chronology has to be built on the data supplied intrinsically by the texts themselves. In determining the dates of respective works of Hindu law conflicting opinions have often been expressed by scholars. It is not my purpose to enter into a detailed discussion of the merits of these controversies in this place. I will be content to adopt the chronology as fixed by Dr. Kane since my only object in referring very briefly to the period covered by the texts on Hindu law is to indicate how it covers many centuries indeed. The Vedic period covers between 4000 to 1000 B.C. The Srāutasūtras were composed some time between 800 B.C. to 400 B.C. They were followed by the Dharmasūtras, whose period ranged roughly between 600 B.C. to 300 B.C. Then we have the Arthaśāstra of Kauṭilya which was between 300 B.C. to 100 A.D. The age of Manu is between 200 B.C. to 100 A.D., whereas that of Yājñyavalkya is between 100 A.D. to 300 A.D. Kātyāyanasmṛti was composed between 400 A.D. to 600 A.D. and all the other *smṛtis* had been composed before 900 A.D. Medhātithi wrote his commentary on Manusmṛti in 900 A.D., whereas

Vijñāneśvara wrote the Mitāksarā between 1070 to 1100 A.D. The works of Jimutvāhana were written between 1100 to 1150 A.D., whereas Nandapandita wrote his works between 1590 to 1630 A.D. Nirnayasindhu was composed between 1610 to 1640 A.D., Vyavahāramayūkha between 1615 to 1645, and Dharmasindhu in 1790 A.D. It would thus be seen that the period covered by the ancient Sanskrit literature on Hindu law is no less than 5000 years. It would, therefore, be realised that Mayne in his first edition of Hindu Law was not at all exaggerating when he said that "Hindu Law has the oldest pedigree of any known system of jurisprudence, and even now it shows no signs of decrepitude." I have deliberately referred to this aspect because I wish to emphasise the fact that Hindu law could not have remained static or stagnant during all these ages. There is a popular feeling amongst the Hindus that any attempt to legislate on Hindu law must be discouraged since such fresh legislation affects Hindu religion. This attitude is based upon the assumption that the secular part of Hindu law is the same as the religious part and that this secular part has never been modified or superseded. It is difficult to criticise the public feeling that the secular and the religious are indistinguishable, because this belief is the result of the method adopted by the ancient Hindu texts in dealing with the two aspects of law. In ancient times no distinction between these two aspects was made and the attempt was to clothe every action in human life with some religious aspect. It would be no exaggeration to say that the ancient Hindu way of life treated the whole course of human life from the cradle to the grave as the continuous performance of a religious rite. I have already indicated that the Vedas do not deal directly or primarily with any problems of law. In the Vedic and the Sūtra periods the concentration was on the performance of sacrifices and rituals connected therewith. It is true that the *smṛtis* are not so much concerned with the performance of sacrifices and the rites and rituals connected with them ; but even in the *smṛtis* we find a combination of all aspects of human life, the metaphysical, the religious, the philosophic and the secular. Naturally, the Hindu public which has been trained to look up to the *smṛtis* as a source for guidance are sometimes unable or disinclined to distinguish between these different aspects. But though the popular belief in the matter may thus be explained, it is nevertheless historically unsound. Hindu law properly so-called has never remained static or immutable. Even a casual acquaintance with the different works of Hindu law will suffice to show that the Hindu texts do not show uniformity of outlook on important topics ; and it is not surprising that there should be no uniformity on all topics either. Amongst the sources of Hindu law recognised by the *smṛtis*, the conduct of the good people is undoubtedly one. Custom has

thus played a very important part in adopting and adjusting the provisions of Hindu law with the requirements of the times. It is true that the divine origin of Hindu law was always respected as an article of faith ; it is also true that the Vedas were revered as the first and paramount source of Hindu law. But the social conscience amongst the Hindus was awake and if customs and the modes of life changed from time to time and varied from place to place, these changes and variations were introduced and accepted under the guise of interpreting the same ancient texts. The part played by the commentators in developing the Hindu law on these lines is very important. Undoubtedly their task was unenviable, because they had to reconcile their special customs with the ancient texts. The dialectical discussions in which these commentators took delight display a remarkable legal subtlety and ingenuity on their part. In many places the discussion of the texts is carried on such a high level that it would do credit to the lawyers of any age. In fact, the schools of Hindu law as they are recognised today owe their origin to the different views that prevailed in different areas of this country. It is a very curious and typical feature of the growth of Hindu law that different and somtimes conflicting customs and practices were recognised as valid in different areas, though all the areas in turn purported to owe allegiance to the same ancient texts. The ingenuity of the commentators and the flexibility of the rules of construction on which they relied contributed to this result. It cannot of course be denied that the reasons adopted by the different commentators in adjusting the provisions of ancient texts to the needs of the changing customs of their times and their localities do sometimes appear to be fanciful and almost fantastic ; but any criticism against their method based on the academic considerations of the purity of construction should not overlook the fact that the method they adopted ultimately served a very useful purpose. It would not be possible for me to develop this point by taking specific instances during the course of the present lectures. But I venture to think that on the broad point as I have enunciated there would not be much of a difference of opinion. The Hindu law today is divided into two schools, the Mitāksharā and the Dayabhaga. The Mitāksarā, as I have already indicated, is a commentary on Yājñyavalkya and in dealing with Yājñyavalkya it has frequently considered the provisions in Manusmṛti and other *smṛtis* as well. Jimutāvahāna, who wrote his Dayabha, himself bases his conclusions on the same ancient *smṛtis*. The Mitāksarā school in turn is subdivided into four schools : the Benares, the Mithila, the Maharastra and the Dravida or Madras. Now, the texts which are treated as of paramount authority by these respective sub-schools themselvese purport to interpret the same ancient *smṛtis*. It is therefore, necessary to remember that though there are different schools of Hindu law and

that though in administering Hindu law, Courts of the country recognise the existence of different schools of Hindu law, the tenets of these different schools purport to be based on the same Sanskrit texts and the existence of these schools can be explained only on the hypothesis that the interpretations put upon the texts by the exponents of these different schools were intended either consciously or unconsciously to recognise the customs which had grown at the different times when and in the different areas where the writers lived. We must, therefore, discouarge the popular belief that Hindu law has remained static and so no attempt should be made to change its provisions.

The other popular belief that religion is inextricably mixed with civil law must also be corrected. The method adopted by the *smṛtis* in dealing with topics of secular law in the light of metaphysical and religious considerations has several times caused difficulties even to the Privy Council in deciding questions of Hindu law. In *Rao Balwant Singh* v. *Rani Kishori,* (1898) L.R. 25 I.A. 54, at p. 69, their Lordships observed :

> " All these old text-books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindu law Sir William Macnaghten says : ' it by no means follows that because an act has been prohibited, it should therefore be considered as illegal. The distinction between the *vinculaum juris* and the *vinculum pudoris* is not always discernible. ' (Hindu Law, Principles and Precedents, p. vi of the preliminary remarks.)'

In a later case, *Sri Balusu Gurulingaswami* v. *Sri Ramalakshmamma,* I.L.R. 22 Mad. 398, at p. 415, their Lordships cited these observations and said :

> "They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity, never contemplated by the original law-givers."

Even so, it is necessary to educate public opinion so as to enable the public to distinguish between the religious aspect of *dharma* and its

secular aspect, which is otherwise called the positive or secular law. If it is once realised that the positive law has been changing from time to time and from place to place, the objection against the Code and in fact against any attempt at legislation in matters of personal law based upon the apprehension that religion itself is in danger will lose all its validity. The process of the growth and development of Hindu law was in fact continued by commentators and writers of treatises on Hindu law until the period of the Brtish rule. Under the British rule, however. this process was unfortunately arrested. During the whole period of the British rule in India Government were disinclined to enter upon legislation which would affect the personal law of the subjects. Attempts were, however, made by social reformers from time to time to redress some grievances felt in administering Hindu law. I will refer to these attempts later. But on the whole the period of the British rule is marked by a disinclination on the part of Government to make any violent departure in the matter of personal laws governing the subjects. The result was that legislature could not perform its legitimate function in bringing the Hindu law in conformity with the changing customs of the Hindus. Courts of law which administered the Hindu law also worked under a handicap. In the first few years Judges who administered the Hindu law in many cases were given the assistance of Pandits, because they were not familiar with the language in which the material texts were written. This assistance was discontinued in 1868 and thereafter on all questions of Hindu law the Judges were left to deal with the texts in the form of English translations. It was laid down by the Privy Council in the well-known case of *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, (1868) 12 M.I.A. 397, at p, 436, that the duty of a Judge was not so much to inquire whether a disputed doctrine is fairly deducible from the ealiest authorities, as to ascertain whether it has been received by the particular School which governs the District with which he has to deal, and has there been sanctioned by usage. This naturally meant that in some cases undue importance came to be attached to the views of writers whose works were available to the Judges at the earliest stages. Scholars of Hindu law such as Sarkar and Dr. Kane have bitterly complained against the injustice done to the texts of Hindu law in some cases by reason of the fact that wrong or incomplete translations were put before the Judges who were not able to look into the original texts themselves. It is known to every student of Hindu law that during the period of the British rule the Privy Council contributed very richly to the development of all branches of Indian law. The Judges, the lawyers and the litigants of this country undoubtedly owe a deep debt of gratitude for the guidance which they received from the eminent Judges of the Privy Council during the whole

of this period. Questions in all branches of law involving the consideration of complicated matters of principle were always discussed by the Privy Council with remarkable lucidity and on occasions the views accepted by the Indian Courts were set right by them in a masterly manner. Their Lordships of the Privy Councils, however, felt difficulty in dealing with the questions of Hindu law. On some occasions they have themselves expressed a sense of diffidence arising from the fact that they were not familiar with the language of the Sanskrit texts and were not quite conversant with the historical development of the different views which were to be found in the translated texts placed before them. This position was rendered still more difficult because of the manner in which several questions were discussed by the Hindu texts themselves. Even so, on most of the points raised before the Privy Council they evolved principles in a manner which evoked the admiration and respect of the Indian Courts. But the limitation which the Privy Council imposed upon the Courts administering Hindu law, however proper and inevitable it may have been, led to the somewhat unfortunate result that the development of Hindu law was arrested, because in applying that principle, in courts "no voices were heard unless they came from the tomb." It is true that in the same case of *The Collector of Madura* the Privy Council had enunciated another principle that under Hindu system of law "clear proof of usage will outweigh the written text of the law." But this afforded very little assistance for the rapid progress or development of Hindu law, since the proof of custom according to the rules of the Evidence Act was a very difficult matter indeed. Custom which could be recognised by Courts in supersession of the principles of Hindu law had naturally to be ancient, certain and reasonable, and lawyers who are familiar with the rules of the Evidence Act will easily appreciate that the proof of such a custom, which in fact may be true and existing, was not always an easy matter for the litigant and in many cases the efforts required to prove such a custom by leading sufficient evidence were beyond his reach. That is why during the British rule the law as administered in courts was in many important matters at variance with the custom which had been recognised by the social conscience of the Hindus. In other words, the work which was being done by the different writers on Hindu law before the British rule was suddenly stopped during the British rule and Hindu law in effect came to be fossilised. I do not deny that from time to time customs in derogation of textual law were recognised by Courts of law ; but on the whole I am disposed to think that during this period Hindu law tended to become rigid and static. Let me illustrate my point by taking just a few instances.

The Hindu law of marriage as administered by Indian Courts required that the bride and the bridegroom should not belong to the

same *gotra* ; if they belonged to the same *gotra* the marriage was invariably treated as invalid. This question was raised before Kania Ag. C.J., as he then was, and myself in *Madhavrao* v. *Raghavendrarao*, (1945) 48 Bom. L.R. 196. In that particular case the parties who had been married belonged to the same *gotra*, but they had alleged that under Hindu law their marriage was valid and alternatively that their marriage was supported by custom. We held the custom proved and so the marriage was saved. But we felt considerable difficulty in subscribing to the view that under the Hindu texts such a marriage should be held to be invalid. I do not at this place propose to cover the ground which has been covered in our judgment in the said case. It would be enough if I mention that the whole theory underlying the view that *sagotra* marriages are invalid is fantastic in the extreme. If the history of the *gotra* and the *pravara* is considered it would be clear to any dispassionate student that the prohibition against *sagotra* marriages is irrational. The texts of Yājñyavalkya on which this prohibition was based contains several other stipulations and it is a matter of common knowledge that the said other stipulations are merely recommendatory. Yājñyavalkya says that the girl to be married should be younger than the bridegroom, should be healthy, should have brothers, should not have the same *gotra* and *pravara*, and should be five degrees removed from the mother and seven degrees from the father ; she should also come from a highly respectable family of persons well-versed in the Vedas and not even from such a family if there be any hereditary disease.*

Now, it would be fantastic to suggest that if the girl married is unhealthy or has no brothers, the marriage should be invalid. And yet Courts of law had to hold that a *sagotra* marriage was invalid because Vijnanesvara in his commentary on this text of Yājñyavalkya had stated that in the case of a *sagotra* wife the marriage is invalid :

सपिण्डासु समानगोत्रासु समानप्रवरासु भार्यात्वमेव नोत्पद्यते ।
रोगिण्यादिषु तु भार्यात्वे उत्पन्नेऽपि दृष्टविरोध एव ॥

And the justification for this statement of Vijnanesvara is that the marriage between *sagotra* persons involves the violation of an unseen rule on which the prohibition is based. Following the direction of the

* अविप्लुतब्रह्मचर्यो लक्षण्यां स्त्रियमुद्वहेत् ।
अनन्यपूर्विकां कान्तामसपिण्डां यवीयसीम् ॥
अरोगिणीं भ्रातृमतीमसमानार्षगोत्रजाम् ।
पंचमात्सप्तमादूर्ध्वं मातृतः पितृतस्तथा ॥
दशपूरुषविख्याताच्छ्रोत्रियाणां महाकुलात् ।
स्फीतादपि न संचारिरोगदोषसमन्वितात् ॥ (Yaj. III, 52-54.)

Privy Council that it was not for us to consider whether the view of Vijnanesvara was justified or not, if custom had not been proved in that particular case we would have had to hold that the marriage was invalid. I crave for your permission to quote a passage from my judgment :

> " It is true that while dealing with questions like this, Courts have to construe the texts of Hindu law in the light of the explanations given by recognised commentators. But it must always be remembered that since the said commentaries were written, several centuries have passed by and during this long period the Hindu mode of life has not remained still or static. Notions of good social behaviour and the general ideology of the Hindu society have been changing ; with the growth of modern sciences and as a result of the impact of new ideas based on a strictly rational outlook of life, Hindu customs and usages have changed. The custom as to marriages between persons of the same *gotra* which I have held proved in this case is an eloquent instance in point. Between the letter of the law and *sadachar*—good conduct, according to the consciousness of the community—there is obviously great variance. It follows, therefore, that the prohibitions which have been so emphatically enunciated by the *Nibandha* writers in this connection have not, for a considerable time past, conformed to the usage and custom recognised by the community. In such a case it is obviously the duty of the legislature to intervene and to amend the material provisions of Hindu law so as to make them consistent with the custom and usage prevailing in society and thus help to place the Hindu law of marriage on a more rational basis."

By a happy coincidence the Indian Legislature passed Act No. XXVIII of 1946 by which this anomalous position in Hindu law has been finally remedied. It would thus be realised that if Legislature had not intervened this anomaly of Hindu law would have still remained.

Take another aspect of the law of marriage. As the law is at present administered marriages between persons belonging to different castes are held to be invalid in the absence of usage to the contrary in all States except Bombay. Even in Bombay Mr. Justice Chandavarkar has taken the view that according to the leading authorities of Hindu law a Sudra wife is not permitted to marry a Brahmin, a Kshatriya, or a Vaishya. It is true that in *Bai Kashi* v. *Jamnadas*, (1912) 14 Bom. L.R. 547, where Mr. Justice Chandavarkar expressed this opinion the Court was dealing with the marriage of a Brahmin woman to a Sudra, and so the said observations of the learned Judge were *obiter*. The decision

was that the marriage of a Brahmin woman with a Sudra person was invalid. Subsequently, however, despite these observations of Mr. Justice Chandavarkar the Bombay High Court has held that *anuloma* marriages between members belonging to two different castes are valid : *Bai Gulab* v. *Jiwanlal*, (1922) 46 Bom. 871, *Natha* v. *Mehta Chotalal*, (1931) 55 Bom. 1. It would thus be clear that though in the social life of today the distinction between different communities has almost disappeared, a marriage between persons of different communities would not be recognised in all the States of India except Bombay, and even in Bombay, that between a woman of a superior class and a man of an inferior class would still be regarded as invalid.

Now, take another instance in the branch of the law of adoption. Recently when I had to deliver lectures under the auspices of the Bombay University on some of the problems of the law of adoption I have shown that some of the judicial decisions were based upon clear misconstruction of the Sanskrit texts. The Bombay High Court has taken the most liberal view in the matter of the woman's right to adopt. But this view was based upon the assumption that Vyavaharamayukha allowed the widow of a separated member to adopt without the consent of her relatives in her husband's family. Now, if the text of the Vyavaharamayukha is properly construed it would show that Nilakantha insisted that before the widow could adopt she ought to obtain the consent of her husband's father even though her husband had separated from his father during his lifetime. This aspect of the text was ignored even by Mr. Justice Mulla who delivered the judgment of the Privy Council in the well-known case of *Bhimabai* v. *Gurunathgouda*, 35 B.L.R. 200. The view that amongst the *dwijas* a daughter's son cannot be adopted, which has been accepted by the Bombay High Court, is similarly based upon a misconstruction of the Vyavaharamayukha. Nilkantha has in terms sanctioned such an adoption and has referred to the earlier writing of his father and has clearly mentioned that the usage of adopting a daughter's son is recognised amongst the respectable. And yet the proper translation of the material text was not made available to the Court and all these days even the Bombay High Court has held that the adoption of a daughter's son made by a regenerate Hindu is invalid.

The question as to whether a Hindu son can claim partition of his share in a case where his own father stays jointly with his collaterals afford another instance. Mr. Justice Telang considered the texts and definitely came to the conclusion that a son's right could not be rejected merely on the ground that his father stays in coparcenary with his collaterals : *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni*,

(1891) I.L.R. 16 Bom. 29. And yet the other learned Judges of the Full Bench differed from Mr. Justice Telang, not so much on the ground of textual interpretation as on considerations of expediency. I am prepared to concede that considerations of expediency may have justified that view; but if the texts have to determine these points, I feel that Mr. Justice Telang was right. In fact, the view propounded by him has been accepted by all the Indian High Courts except the Bombay High Court.

Then take the question of the woman's right to property as understood by Mitaksara. In dealing with *stridhana*, Yājñyavalkya mentioned different categories of *stridhana* and ended by saying that these properties and the rest are denominated 'woman's property.'* Vijnanesvara explained the word *ādyam* as including property which a woman may have acquired by inheritance, purchase, partition, seizure and finding, and he made it perfectly clear that according to him the term "woman's property" conforms in its import with its etymology and is not intended in any technical sense.† In the discussion of this topic we see Vijnanesvara at his best. He has made clever use of the word *ādyam* for the purpose of introducing all other kinds of property of which a woman may be possessed, and he has explained the sixfold classification of *stridhana* by Manu as being merely illustrative and not exhaustive. Under the British rule when this question came to be considered by the Privy Council they took the view that the expansion of the denotation of the word *stridhana* introduced by Vijnanesvara was not justified. The result was that the word *stridhana* is interpreted by Courts in a technical sense and not in the etymological sense as suggested by Vijnanesvara. I do not propose to express any opinion on this topic; but I wish to emphasise that but for the restrictive interpretation put by the Privy Council on the word *stridhana*, prehaps the story of woman's rights under Hindu law would have been differently written during the last century.

I would like to illustrate my point that the development of Hindu law was unfortunately arrested during the British rule by taking two more instances which are of considerable importance. The Hindu law as discussed in the ancient texts was based upon the well-known fourfold division amongst the Hindus: the Brahmins, the Kshatriyas, the Vaisyas and the Sudras. Whether this fourfold division ever represented

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* पितृमातृपतिभ्रातृ दत्तमध्यग्न्युपागतम् ।
आधिवेदनिकाद्यंच स्त्रीधनं परिकीर्तितम yaj. II 143.

† आद्यशब्देन रिक्थक्रयसंविभागपरिग्रहाधिगमप्राप्तमेतत्
स्त्रीधनं मन्वादिभिरुक्तम् । स्त्रीधनशब्दश्च यौगिको न पारिभाषिकः ।

n all meticulous details actual existing facts or not, there can be no oubt that this distinction has been completely obliterated in the social ife amongst the Hindus for several years past. It would be idle to laim that Hindu society today conforms even remotely to this four-old division. The professions and the avocations exclusively belonging o one section are now shared by all the sections together and the rules f conduct specially prescribed for different classes are no longer observed. nd yet in dealing with an important community in Maharashtra this istinction has often to be notionally treated as valid by Courts of law. t would be recalled that in the first quarter of this century in Maharashtra here was a stormy controversy as to the rights of the Marathas to erform the Vedic rites. The orthodox section of the Brahmins denied his privilege to the large section of the Marathas on the ground that the Iarathas were Sudras, and under the orthodox convention Sudras are ot entitled even to pronounce the Vedic Mantras. On the other hand, he Marathas naturally resented this aspersion on their status and claim-d to be Ksatriyas and as such they asserted that they were entitled to erform the essential ceremonies according to Vedic rites. This con-roversy reached the Bombay High Court in *Subrao* v. *Radha*, (1928) 0 Bom. L.R. 692, and the Bombay High Court approached the con-ideration of the question dispassionately, purely on legal grounds. Ir. Justice Madgavkar who delivered the principal judgment of the ourt emphatically stated that with controversies, political or com-nunal, and their passions, the Courts are not concerned. Both Mr. Jus-ice Madgavkar and Mr. Justice Patkar took a liberal view on the ques-ion and yet they were constrained to lay down certain tests which ccording to them had to be satisfied before any Maratha could claim to e a Kshastriya. Shortly stated, these texts were : (1) the sconscious-ess of the caste ; (2) its customs, and (3) the acceptance of that conscious-ess by other castes. The customs which were treated as of decisive mportance were : the preformance of *upanayana*, wearing of the acred thread, observance of *aśoucha* and the observance of the prohibi-ion against *sagotra* marriages. This judgment was delivered in 1928 nd it was then held as a very liberal exposition of law and was in fact cclaimed as a triumph by the reformers of Maharashtra. Twenty ears have since gone by, and the tests then laid down appear today o be almost obsolete. Social progress in Maharashtra has in the neanwhile been so rapid that anyone who is familiar with the present ustoms and beliefs would feel considerable hesitation in holding that a Maratha is not a Kshatriya merely because the tests as to customs laid lown by this Court in *Subrao's* case are not satisfied by him. I venture o think that it would not be any exaggeration to say that the test as o the observance of the customs on which considerable emphasis was aid by both the learned Judges in *Subrao's* case would not be satisfied

even by the Brahmins properly so-called of today. Now, unless Legislature intervenes and puts an end to this anomaly Courts of Law would still have to apply mechanically the tests laid down in this case and solemnly proceed to consider whether the Marathas before them are Kshatriyas or not. I cannot imagine a sadder case where the lag between the law recognised in Courts and the customary belief and practice in society is so wide.

The position is much the same if not worse with regard to another important community of the State of Bombay. So far as the Lingayats are concerned the Bombay High Court has held that they are Sudras and the Hindu law that governs them is the law applicable to the Sudras. I apprehend that this would be a matter of considerable importance to the students of the Karnatak University and so I propose to deal with this question at some length. The great teacher Basava, who founded the Lingayat sect, was the Prime Minister of Bijjala in the middle of the twelfth century. The sect which he founded dissented from many of the practices which were then prevailing under the Hindu religion. Basava in his teachings emphatically declaimed the fourfold division of the Hindu society and he preached bortherhood in clear and unmistakable terms. The inferior position attached to the Sudras under the conventional Hindu view had no place amongst the followers of Basawa; they treated themselves as a band of fellow-devotees amongst whom there was no question of superior or inferior. The Lingayat view also refused to subscribe to the inferior status assigned to the woman under the old Hindu conventional texts. According to the Lingayats both men and women are equal in all respects. Philosphically, Basawa believed in Visisthadwaita. The Vedas were accepted by Basawa, but not the subsequent Hindu religious writings which glorified the performance of sacrifices and other incidental rites. Basawa preached that religion was essential for the progress of human beings as much as food is essential for their existence. This religion is a personal affair of each *jeeva*, whether male or female, and the way to heaven lies by means of devotion according to Basawa. He, however, emphasised that it was wholly unnecessary to rely on the intervention and assistance of the priestly class to obtain spiritual bliss. The well-planned life of the Lingayats is termed Kayaka as practised by the Lingayat saints, who are revered by all Lingayats as spiritualists of a high order. Basawa wanted to make religion simple and suitable of practice to all men. It would appear that Basawa believed in *Ahimsa* and he insisted upon consistency between thought and action. It is true that the Lingayats do not recognise the validity of the performance of sacrificial rites; but that is not to say that they have discarded all rites altogether. These rites which even the Agamas of the Lingayats prescribe are

intended to turn the mind of the devotee towards the renunciation of this world and not towards the aggrandisement of worldy happiness. It may be said that in practice the Lingayat sect amounts to Shivayoga, which includes the best elements of other forms of *yoga* as well. The Lingayats worship Shiva and it is customary amongst the orthodox Lingayats to carry the symbol of this Shiva worship on their bodies. Since they believe in a fraternity of devotees there is no prohibition against interdining or intermarriage as between them. Prof. Sakhare has recently published a valuable book on the ' History and Philosophy of Lingayat Religion'. Many aspects of the development of the Lingayat view of life have now become available to the students since the publication of this book. Prof. Sakhare, has, however, developed the thesis that the Lingayats are not only dissenters from orthodox Hinduism, but they cannot properly be called Hindus at all. I do not propose to enter into any controversy on this point; but it seems to me that it all depends on how you define the word ' Hindu ' before you can answer the question whether the Lingayats are Hindus or not. The definition of the term ' Hindu ' which Tilak gave in his commentary on the Bhagavadgita is :

प्रामाण्यबुद्धिर्वेदेषु साधनानामनेकता ।
उपास्यानामनियमः चैतद्धर्मस्यलक्षणम् ।।

I confess that many scholars have found it difficult to define the word ' Hindu.' Hinduism is not so much a religion as a way of life and the word has, therefore, eluded a satisfactory definition. Tilak who considered all the idiological and practical features of Hinduism ultimately preferred to define Hinduism in these terms. If this test is applied it would not be reasonable to hold that the Lingayats are not Hindus. In fact Dr. Radhakrishnan, who has written a short foreword to Prof. Sakhare's work, has himself stated that "as the Lingayat religion accepts the authoritativeness of the Agamas and repudiates the distinctions of caste, it is said to be non-Hindu. I am afraid that this is taking a somewhat narrow view of the spirit of Hinduism." But my point in referring to the broad features of the Lingayat sect was to show that they were a dissenting sect and the cardinal principle of their philosophy was the equality of the sexes and the equality of all men and women. In fact, the religious works amongst the Lingayats sometimes very severely criticise the Brahmanical view under which the Sudras are treated as being inferior to the Dwijas. And yet the followers of Basawa are treated by Courts of law as being no better than Sudras themselves. I have wondered why this view of the Courts has not been more systematically challenged during all these years.

Unfortunately this question was raised before the Bombay High Court only incidentally in 1879 in *Gopal Narhar Safray* v. *Hanmant Ganesh Safray and another*, I.L..R 3 Bom. 273. Westropp, C. J. and Kemball J. had to consider the question as to whether the adoption of the daughter's son was valid. It was a case from the Satara District and the trial Court had held that the adoption though initially invalid had to be held to be valid on the strength of the maxim *quod fieri non debuit factum valet.* The District Court held that the invalidity of the adoption could not be cured by the doctrine of factum valet and reversed the trial Court's conclusion. The High Court agreed with the view of the District Judge. The parties to the litigation were Brahmins and the High Court took the view that the prohibition against the adoption of a daughter's son was so peremptory that the violation of the rule made the adoption void altogether. In dealing with this question some earlier judgments of the Privy Council as well as the Bombay High Court were cited before the Bench and as it happened two of the judgments of the Bombay High Court had dealt with the case of Lingayats : *Gunpatrav* v. *Vithoba*, 4 Bom. H.C.R. 130, A.C.J., and *Mhalsabai* v. *Vithoba Khendappa Gulve*, 7 Bom. H.C.R. Appx. p. xxvi. Westropp, C. J. and Kemball, J. held that the said precedents were not helpful because Lingayats were Sudras and the prohibition against the adoption of a daughter's son was not applicable to the Sudras. That is how they explained the earlier judgments and adhered to their view that so far as Dwijas were concerned the adoption of daughter's son is invalid and cannot be cured by the doctrine of *factum valet.* In dealing with the status of the Lingayats the learned Judges observed ; " The admission of illegitimate sons amongst Lingayats to dine with and marry in the caste, the prevalence in it of *pat* marriages and the succession of the illegitimate son to property,. . .are so many badges of the Sudra tribe." They referred to the view expressed by Steele in that behalf in support of their conclusion. It would thus be clear that the point as to the status of the Lingayats had not directly been raised before the Court and naturally all aspects of this problem were not and need not then have been considered. Besides, not much literature on the origin and growth of the Lingayat sect was then available to the Court; they had to be content with such scanty material as was placed before them.

In 1896 the Bombay High Court had another occasion to consider the status of the Lingayats in *Fakirgauda* v. *Gangi*, I.L.R. 22 Bom. 277. In this case Farran, C. J. and Hosking, J. held that according to the Lingayat religion as well as according to Hindu law marriages between members of different sects of the Lingayats are not illegal. The learned Judges accepted the view expressed in *Gopal Narhar Safray* v. *Hanmant Ganesh Safray and another* as finally determining the status of the

Lingayats and they proceeded to deal with the question before them on the basis that the Lingayats were Sudras. The point as to the status was apparently not argued and has, therefore, not been considered on the merits at all. Jardine and Ranade, JJ. seem to have taken the same view in *Basava* v. *Lingangauda*, I.L.R. 19 Bom. 428, where they held that according to the custom of Lingayats in the districts of Dharwar and Bijapur the adoption of an only son is valid. Mr. Justice Ranade observed that the Lingayats are admittedly a heretical sect and are not subject to Brahmin religious laws and repudiate the Shastras in the matter of the obligatory character of funeral rites and *shraddhas* on which Brahmins lay so much stress. These observations are no doubt true and if Mr. Justice Ranade had said nothing more in the judgment, no exception could have been taken to these observations. But then the learned Judge referred apparently with approval to the view expressed by Chief Justice Westropp in *Gopal Narhar* v. *Hanmant Ganesh*, and he added that the Madras High Court had taken the same view about the status of the Lingayats : *Virasangappa* v. *Rudrappa*, I.L.R. 8 Mad. 440.

The question about the status of the Lingayat community was again considered by Divatia and Lokur, JJ. in *Tirkangauda Mallangauda* v. *Shivappa Patil*, (1943) 45 Bom. L.R. 992, and the earlier view that the law applicable to the Sudras governed the Lingayats was followed. Divatia J. was apparently not happy about this position ; that is why he observed at p. 1002 :

> " However undesirably frozen the present Hindu law has become with regard to the rigid and unchangeable character of caste distinctions, a progressive community, considered socially inferior in the past, can make out a good case before a modern Legislature for doing away with legal disabilities based on distinctions which have long since ceased to be justifiable."

With respect, I agree with these observations. I wish to add that the Hindu Code purports to end this anomaly and ought to be supported on that ground.

It was, however, apparently not noticed even in this judgment that this important question had never been fully argued before the Bombay High Court. Unfortunately, the position therefore is that the view that Lingayats are Sudras, which has stood unchallenged all these years, is ultimately based upon the *obiter dicta* in *Gopal Narhar* v. *Hanmant Ganesh*, 3 Bom. 273. It is possible that if this question is raised hereafter by any Lingayat parties in a civil Court and if additional

material as to the tenets of the Lingayat sect and the status of the Lingayat community as a whole is laid before the Court, the Court may have to reconsider this question. But the important point to remember in our present discussion is that this large and influential community of the Karnatak is at present treated as Sudras for the purpose of the application of personal law. Ironically enough whereas the Great Basava revolted against the artificial distinctions which Brahmanical religion enforced, his followers themselves are treated by the Courts of law as belonging to the most inferior strata of Hindu society. This position is clearly inconsistent with the social consciousness of the community and the lag between the theoretical view of the law at present accepted and the real status of the community is so wide that Legislature must step in and correct the anomaly. If, therefore, the artificial distinctions of superior and inferior which are in part inextricably mixed up with the law as enunciated by the ancient Hindu texts have to be wiped out it can be done by the Legislature alone. I do not think, a strong or a long argument will be necessary to convince all the Hindus that the stage to divide the Hindus into four water-tight compartments is long past and the method of treating this fourfold division in the order of hierarchical importance has now become completely obsolete. This distinction is entirely unfair and unjust and it has for many years ceased to be respected in actual life.

My object in referring to some of these features of the Hindu law as it is administered by the Courts today is to emphasise the fact that Courts of law have merely to interpret the law ; it is not and can never be the function of the Judges to change the law. And however much the Judges may feel that the law which they are interpreting and administering is out of tune with the popular beliefs and customs of the day, they would have to give effect to the obsolete provisions until custom to the contrary is proved or Legislature intervenes. In this connection it is necessary to remember that the Hindu Code does not represent the first attempt to legislate in matters of personal law. It is true, as I have already mentioned, progress in the matter of legislation in regard to personal law has been very slow indeed during the whole of the British rule ; but even so there have been many instances where the accepted rules of Hindu law have been either modified or completely abrogated by legislation. One has merely to look at the large number of Acts which have been passed in the last three quarters of a century to realise that Legislature has not been quite idle during this period. Let me refer to some of the important Acts which have been passed in this behalf.

The first Act which was passed in 1850 is known as The Caste Disabilities Removal Act (XXI of 1850). By this Act it was declared

that " so much of any law or usage now in force within British India as inflicts on any preson forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the courts of British India." It would not be difficult to imagine what a rude shock this legislation must have caused to the orthodox Hindu conscience of those days. Virtually it set aside at one stroke all the provisions of Hindu law under which renuciation of religion or exclusion from caste entailed serious consequences for the party concerned. Six years thereafter came the Hindu Widows' Remarriage Act (XV of 1856). No doubt, the Act was enabling, but it undoubtedly gave effect to the views of the reformers of the day and in passing this Act and in recognising the remarriage of Hindu widows the conventional beliefs of the Hindu public must have received another shock. In 1872 we had the Special Marriage Act (III of 1872), and as to this Act again there was very great controversy at the time when it was passed. The Indian Majority Act of 1875, and the Guardians and Wards Act of 1890 totally repealed the relevant provisions of the Hindu law, and the Transfer of Property Act did the same in 1929 with regard to the matters mentioned in s. 129 of the said Act. In 1928 several disabilities which disqualified the persons from inheritance were removed by The Hindu Inheritance (Removal of Disabilities) Act, whereas in 1929 the line of succession with regard to the heirs mentioned in the Act was amended by The Hindu Law of Inheritance (Amendment) Act. In 1930 the Hindu Gains of Learning Act materially affected the provisions of the Hindu law as they were interpreted till then. And in 1937 the well-known Hindu Women's Rights to Property Act materially affected the views of Mitākṣāra in so far as they related to women's rights of inheritance. Recently in the State of Bombay bigamy has been prohibited by The Bombay Prevention of Hindu Bigamous Marriages Act, XXV of 1946, and divorce has been allowed under the provisions of The Bombay Hindu Divorce Act, XXII of 1947. Thus it would be seen that between 1857 to 1947 several Acts have been passed which either modified or superseded the old notions of Hindu law. It would, therefore, not be correct to say that Legislature is intervening in the provisions of personal law for the first time. Indeed, it was because the defects of piecemeal legislation were felt by the litigants and emphasised by the lawyers and the Judges that the Legislature thought of considering the question of enacting the Hindu Code as a whole. Take the case of the Hindu Gains of Learning Act. The provisions of this Act undoubtedly gave much-needed relief to the persons who were being sacrificed under the old view of Hindu law. It was possible under the said view to call upon an undivided Hindu to bring into the hotchpot all his acquisitions

even though towards his education the joint family may have contributed a negligible amount. To this extent this Act rendered service and was treated as a reformist measure of considerable importance. But, on the other hand, it afforded protection to an undivided member against the claims of his coparceners even though he may have received considerable assistance from the joint family for his own special education. The same considerations apply to the amendment introduced in the matter of succession. It is not difficult to realise how in legislating for the removal of particular defects in the Hindu law a complete and interrelated picture of the Hindu law was not borne in mind and the effects of the particular legislation on the other allied provisions of the Hindu law were not always considered.

In fact, it was after the passing of the Hindu Women's Rights to Property Act, 1937, that a committee was appointed by the Government of India on 25th January 1941, to examine the said Act and the proposals to amend the said Act which had then been received and to suggest such amendments to the Act as would (1) resolve the doubts felt as to the construction of the Act, (2) clarify the nature of the right conferred by the Act upon the widow ; and (3) remove any injustice that may have been done by the Act to the daughter ; and to examine and advise on (1) the Hindu law of Inheritance (Amendment) Bill, promoted by Mr. K. Santanam, and (2) the Hindu Women's Rights to Separate Residence and Maintenance Bill, promoted by Dr. G. V. Deshmukh. This Committee examined the questions referred to them and made their report on the 19th June 1941. They made it clear in their report that they had no desire to exaggerate the mischief of piecemeal legislation and they added that where fundamental changes are not in question, piecemeal legislation may have its value. But on the whole their conclusion was that time had arrived to attempt a code of Hindu law. They were naturally very cautious in their approach and so they did not suggest that all parts of the law should be taken in hand at once. According to them " the most urgent part, namely, the law of succession may be taken up first ; then the law of marriage ; and so on." In this connection it may be mentioned that in his preface to the first edition of Hindu Law, Mayne had expressed a very grave doubt as to whether it would ever be possible to codify Hindu law. The warning which he had uttered against such an attempt has now become almost a classic. " The age of miracles," said Mayne, " has passed, and I hardly expect to see a code of Hindu Law which shall satisfy the trader and the agriculturist, the Punjabi and the Bengali, the pundits of Benares and Ramaiswaram, of Amritsar and of Poona. But I can easily imagine a very beautiful and specious code, which should produce much more dissatisfaction and expense than the law as at present administered."

Unfortunately in making this observation Mayne apparently overlooked one essential feature of Hindu law, as indeed of all laws, that Hindu law has never been static. Since these words were written by Mayne the Hindu mode of life has so completely changed in many aspects that Mr. S. Srinivasa Iyengar who edited Mayne's Hindu Law in 1938 categorically stated that " the age of the legislator has now come " and he had expressed his definite opinion that the codification of Hindu law was by no means an impossible proposition. The Committee agreed with the view of Mr. S. Srinivasa Iyengar and suggested that an attempt should be made gradually and cautiously to attain the codification of Hindu law in course of time.

In pursuance of this report two bills were prepared by the Government of India and they were published in the Gazette of India on the 30th May 1942. These bills were in due course referred to a Joint Committee of both Chambers of the Indian Legislature and in accordance with the recommendations of the Joint Committee, which were accepted by both the Legislatures, the Government of India appointed a committee to consider the proposal to draft a Hindu Code. The Hon'ble Mr. Justice B. N. Rau, as he then was, was the Chairman of both the Committees and the other members of this Committee were Dr. Dwarka Nath Mitter, a retired Judge of the Calcutta High Court, Principal J. R. Gharpure, and Mr. T. R. Venkatarama Sastri of Madras. This Committee toured round the important places in the country, sent out a questionnaire to all important persons interested in the study of Hindu law, examined a large number of these persons orally, considered the replies sent by all of them, and finally made their report on the 21st February 1947. Along with the report they submitted a draft of the bill to amend and codify certain branches of the Hindu law. The report and the draft of the Code then went to the Select Committee appointed by the Indian Legislature and this Select Committee made their own report on the 12th August 1948. The Hindu Code as it was originally put before the Indian Parliament has thus evolved from the labours of all these Committees. After it was introduced in the Indian Parliament a conference was held by the Hon'ble Dr. Ambedkar and as a result of the discussions both at this conference and amongst the legislators themselves, certain amendments have been agreed to by the Government. These amendments have now been published and the proposal of the Law Member is that the Hindu Code thus amended should be passed. This in short is the genesis of the Hindu Code. It would, therefore, be impossible for anyone to suggest that enough labour by competent people has not been bestowed on this task or that the Code has been drafted in haste. All eminent Hindu lawyers who took interest in the reform of Hindu law assisted the committee by giving their

views on the questions posed to them. The committee itself consisted of eminent lawyers and Judges and after an exhaustive and careful discussion between the members of the committee the final report and the proposed Code were submitted by them to the Legislature. The members of the Inquiry Committee and in particular the illustrious Chairman of the Committee have considered the *pros* and *cons* of the whole problem exhaustively and their conclusions have been recorded with remarkable lucidity. The draft Code which they submitted to the Government bears eloquent testimony to their legal accumen and to their vision and imagination. Thereafter the Select Committee carefully scrutinised all the provisions of the draft ; and the responsible officers of the Legal Department must then have assisted in putting the draft into proper shape and form. The Hon'ble Dr. Ambedkar has played an important role in the progress of this Bill and in introducing the Code before the Parliament he has shown his determination to persuade the Legislature to see it through without delay. It is well-known that Dr. Ambedkar can legitimately and justly feel proud for the substantial work done by him in the drafting of our Constitution. If with the active co-operation and support of the Prime Minister, who fortunately shares his Law Member's enthusiasm for the Code, Dr. Ambedkar is able to pilot the Code through all the stages and to give it the pride of place in our Statute Book, I for one would hail it as Time's sweet revenge on the Hindu society as a whole. If Dr. Ambedkar gives us Hindus our Code, his achievement would go down in history as a very eloquent piece of poetic justice indeed !

At this stage it would be convenient if I briefly indicate the broad features of the Hindu Code. The Code as it is presented before the Parliament consists of nine parts and seven schedules. The provisions contained in the Code are distributed among 139 sections and the topics severally covered relate to marriage and divorce, adoption, minority and guardianship, joint family property, woman's property, succession and maintenance. The first important feature of the Code is that sec. 2 of Part I provides that the Code applies to all Hindus, including Vira-shaivas or Lingayats and members of the Brahmo, the Pararthana, or the Arya Samaj, as well as to the Buddhists, Jainas and Sikhs, and it makes no distinction as to the caste or the creed of these respective persons. In other words, the fourfold division of the Hindu society into the four Varnas is completely abolished. This is a feature of the Code on which there can be no two opinions amongst modern men and which must receive the wholehearted support of all Hindus. In dealing with marriage Chapter I of Part II distinguishes between two kinds of marriage, one sacramental and the other civil. In the matter of sacramental marriage the only departure made is, the marriage must be

monogomous, an idiot or a lunatic would not be competent to contract a valid marriage, the bridegroom must complete his 18 years and the bride her 14 years. The provisions as regards the civil marriage are merely enabling and they treat marriage as a matter of contract. The procedure laid down in sec. 10 and the following sections as to civil marriages is on the whole unexceptionable. It provides for making objections to the marriages proposed, their consideration and final disposal and it also directs that a certificate of marriage must be obtained if the marriage is performed in the form of a civil marriage. It is left open to parties marrying under the sacramental form of marriage to register their marriage if they so desire. The prohibition against *sapinda* marriage is kept alive within well-defined limits and it applies both to the sacramental and the civil marriage. Since bigamy, is not allowed, a specific provision has been made applying secs. 494 and 495 of the Indian Penal Code to Hindus who might be guity of bigamous marriage. Sec. 27 of the Code saves marriages solemnised between Hindus before the commencement of the Code which may otherwise be valid, but which may be challenged on the ground that they were contracted between persons of the same *gotra* or *pravara*. It seems to me that this provision is unnecessary because the same object has already been achieved by the provisions of Act XXXVIII of 1946.

Chapter II of Part II deals with void and voidable marriages and sec. 30 in this chapter provides for specific grounds for dissolution of marriage, whether it is solemnised before or after the commencement of the Code. These grounds are : (1) the impotence of either party at the time of the marriage if it continues until the institution of the proceedings, (2) the husband keeping a woman as a concubine or the wife becoming the concubine of any man, (3) conversion of either party to the marriage from Hindu to any other religion, (4) if either party is incurably of unsound mind and has been continuously under treatment for a period of not less than five years preceding the petition, and (5) if either party is suffering from a virulent and incurable form of lunacy. Chapter III of Part II deals with the restitution of conjugal rights and avoidance of marriages. One important provision which may be noticed is contained in sec. 33 which gives the grounds for judicial separation. These grounds are six : (1) desertion of the petitioner for a period of not less than two years, (2) cruelty practised by the other party so as to render it unsafe for the petitioner to live with the other party, (3) if the other party suffers from an incurable venereal disease and in a communicable form not contracted from the petitioner for a period not less than one year immediately before the presentation of the petition, (4) if the other party is suffering from a virulent form of leprosy, or (5) has been habitually of unsound mind since the date of marriage, or (6)

has committed adultery during the marriage. Sec. 36 deals with dissolution of marriage, and sec. 38 gives additional specific grounds for such dissolution. The grounds on which marriage can be dissolved under these provisions are somewhat similar to the provisions of the corresponding Bombay Act XXIII of 1947. Secs. 39 to 44 deal with the questions of procedure and jurisdiction in regard to the applications for judicial separation or dissolution. I may point out that the provision of sec. 40 that every petition must be tried by the District Court and the provision of sec. 44 that every decree for dissolution must be confirmed by the High Court are unnecessary so far at least as the State of Bombay is concerned because in Bombay these proceedings are already permitted to be tried not only by the District Judge and the Assistant Judge, but in some cases even by the Civil Judge, Senior Division, and under the Bombay Act it is not necessary that the decrees passed by the trial Court must necessarily be confirmed by the High Court. An appeal has been provided against those decrees and if no appeal is preferred by the party aggrieved by a decree of this kind it takes effect even without its confirmation by the High Court. I suggest that the Code should adopt the material provisions of the Bombay Act. Then there are certain provisions which deal with the quession of permanent alimony and the custody of children.

Part III deals with the topic of adoption. Sec. 52(3) makes it clear that an adoption which is void shall neither create any rights in the adoptive family in favour of any person, nor destroy his rights in the family of birth. This is a very salutary change and it puts an end to the anomaly from which an invalidly adopted son always suffers under the present Hindu law. The requirement of a valid adoption are substantially the same as at present. Sec. 54 makes a departure in that it insists upon the consent of the wife to the adoption of a son by the husband. Sec. 57 provides for the form in which the autority to adopt can be given and the prohibition against adoption can be imposed, and it requires that in either case the document executed in that behalf must be registered. Sec. 61 deals with the termination of the widow's power to adopt and it may be permissible to point out that sub-sec. (2) of this section may have to be reconsidered because it conforms to the present view of Hindu law that a widow's right to adopt shall not revive after it has once terminated. This means that if unfortunately a widow in a Hindu family survives her son, grandson or great-grandson, or the widows of all or any one of them, she cannot continue the line by making an adoption. This position which is now established under judicial decisions has been criticised by several scholars of Hindu law as being inconsistent with the spiritual basis of adoption. In this connection I would also like to suggest that a provision may well be made for the

adoption of an orphan, because it seems to me that it would be unfair to shut the door of adoption against orphans. I can well imagine many cases where persons desirable of making adoptions would prefer to adopt orphans. Similarly, the prohibition against the adoption of a daughter seems to be unreasonable and irrational. Even Nanda-pandit who is not known for his liberal views on matters affecting women has pleaded for permitting adoptions of daughters and his views has the weighty support of texts. An important change is made in dealing with the question as to who can be adopted. Sec. 63 provides that the adoptee must be a Hindu, must not have been married, must not have been already adopted and must not have completed the age of 15 years. Any person who is familiar with the several anomalies arising under the present Hindu law of adoption will readily agree that these restrictions are necessary. All the anomalies which arise under the Bombay view that even a married person with children can be adopted will under the Code cease to trouble the Judges and the lawyers alike. Sec. 64 makes it clear that the eldest or the only son, the son of a daughter, sister or mother's sister and a stranger can be adopted. Sec. 66 provides, amongst other things, a prohibition against dwyamusyayana adoption.

Chapter II deals with the effects of adoption, and two important provisions in this behalf need to be noticed. Sub-sec. (*b*) of the proviso to sec. 67 provides that property which has vested in the adoptee before his adoption shall not be divested by reason of his adoption, but the obligations attaching to such property including the obligation to maintain relatives in the family of his birth will continue to attach to the said property after his adoption. This is a provision on which two views are possible, and Legislature may have to consider whether from a practical point of view it would not be desirable to divest the adoptee of the estate which may have vested in him prior to adoption and leave that estate to devolve by succession in his natural family, burdened with the claim of maintenance if any. Sub-sec. (*c*) of the proviso to Sec. 67 makes it clear that the adopted son shall not divest any person of any estate which may have vested in him before the adoption, except in the manner and to the extent provided by sec. 68, and sec. 68 deals with the divesting of the estate which has vested in the widow who makes the adoption. These provisions are clearly reasonable and they would avoid several unpleasant disputes that arise at present after adotptions. Sec. 69 provides that subject to any agreement to the contrary an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will. As I will presently point out, the amendments which have apparently been accepted by the Government in regard to the provisions as to right by

birth might perhaps make it necessary to make it clear that the provisions of sec. 69 do not apply to the ancestral property in the hands of the adoptive father. Sec. 73 provides that an agreement not to adopt or curtailing the rights of an adopted son is void. It seems to me that the provision as to the curtailing of the rights of an adopted son is a little too drastic and in view of the amendments to which I have just referred it would be to the advantage of the adopted son if his rights to manage the property are curtailed or if his natural father enters into an argeement with the adoptive widow which may be beneficial for the estate and for the adopted son.

Chapter III deals with the record of adoptions and on the whole the provisions made for keeping the record of all adoptions would serve a very valuable purpose.

Part IV deals with minority and guardianship and the provisions in this part do not call for any special notice.

Part V deals with joint family property. Sec. 86 in this part has given rise to the most strenuous controversy. This section provides that " on and after the commencement of this Code, no right to claim any interest in any property of an ancestor during his lifetime, which is founded on the mere fact that the claimant was born in the family of the ancestor, shall be recognised in any Court." And the explanation to this section makes it clear that the word " property " includes both movable and immovable property, whether ancestral or not, and whether acquired jointly with other members of the family or by way of accretion to any ancestral property or in any other manner whatsoever. Sec. 87 is consequential on sec. 86 and replaces joint tenancy by tenancy in common. Sec. 88 abolishes the rule of pious obligation as at present administered and gives much-needed relief to Hindu sons, grandsons and great-grandsons. This again is substantially consistent with the abolition of the right by birth in any property of the family. I will have to discuss these provisions of the Code in some detail. At present it is enough to add that the Law Member has apparently compromised with the Opposition by adding secs. 90A to 90H to the Code by way of amendment, and these sections substantially restore the Mitākṣāra coparcenary in so far as ancestral property is concerned. The only change that has been made in the Mitākṣāra coparcenary is provided by sec. 90C which deals with the rules applicable to the ancestral property acquired, whether after or before the commencement of the Code, by a member of a coparcenary. The extent of interest which every coparcener has in this property has been defined by this section. Sub-sec. (*d*) of this section provides that when a coparcener dies his widow and

daughter shall amongst themsleves have in the property, in the case of the widow an interest equal to that of the son, in the case of an unmarried daughter an interest equal to one half of that of the son and in the case of a marrieu daughter one quarter of the son. In other words, the basic principle that joint tenancy as understood by the Mitāksāra should be abolished and a coparcener's right by birth in the property of the family should be determined has been given up and a compromise has been arrived at on this important issue.

Part VI deals with woman's property. The important change made in regard to woman's property is mentioned in sec. 91(1) which says that any property acquired by a woman after the commencement of this Code shall be her absolute property. Sec. 93 makes another departure by providing that dowry given on the occasion of or as a condition of or as a consideration for a marrriage shall be deemed to be the property of the woman whose marriage has been so solemnised. It is doubtful whether the system of demanding and accepting dowry copy p. 48 Hindu Code in this manner. I agree that if dowry has to be paid, it should be treated as the property of the girl for whom it is paid. But I personally feel that the dowry system should be positively discarded and sec. 93 which seems to perpetuate it by giving recognition to it does in my opinion require to be reconsidered.

Part VII deals with the question of succession. The vexed question of the order of succession amongst the heirs consisting of agnates and cognates is sought to be simplified by giving separate lists of such heirs in the schedules attached to the Code. Chapter I deals with the general provisions of such succession, and Chapter II deals with the question of intestate succession to the property of a Hindu male, a Hindu woman and a hermit; it also gives general provisions relating to succession such as preference between the full blood and the half blood. Sec. 117 may be noticed, because it provides that an unchaste wife would be disqualified from succeeding to her husband, but insists that the right of the widow to succeed to her husband shall not be questioned on the ground of unchastity unless a Court of law has found her to have been unchaste in a proceeding to which she and her husband were parties and in which the matter was specifically in issue, the finding of the Court not having been subsequently reversed.

Chapter III deals with the testamentary succeesion. It would not be possible for me to discuss in detail the changes proposed to be made by the Code in the order of succession. On the whole I think that the order of succession is rational, reasonable and in consonance with human feelings of nearness or otherwise of relationship between several kinsmen and relatives.

Part VIII deals with the question of maintenance and Part IX provides for power to make rules to carry out the objects of the Code.

Schedules I and II deal with the Acts amended and repealed respectively, while Schedule III gives the statutotry form of the notice of marriage. Schedule IV sets out the statutory form of the declaration to be made by the bridegroom and bride who propose to contract a civil marriage, while Schedule V gives the form of the Registrar's certificate of such a marriage. Schedule VI gives the form of the Registrar's certificate of a sacramental marriage and Schedule VII shows the preferential heirs in Class I and Class II.

I do not claim to have summarised the provisions of the Code in detail. My object in referring to the broad features of the Code was to indicate in a very general way the departures which the Code proposes to make from the accepted notions of Hindu law. It would be noticed that on four important points the Hindu Code has made a departure. First it provides for judicial separation and dissolution in the case of Hindu marriage. Then it provides or initially intended to provide for the abolition of the right by birth of survivorship and of joint tenancy as understood under the Mitaksara law. It also gives a definite share to the daughter in the estate of her father, though the quantum of this share has been reduced under the compromise which has been accepted by the Government. And lastly it makes the estate of the woman an absolute estate. The line of succession has also been altered; but this alteration is a matter more of readjustment than of a violent departure because some change in this line had already been effected by the provisions of Act II of 1929. I will now attempt to show that in all these provisions which have provoked criticism and controversy, it cannot be said that the changes intended to be made are thoroughly inconsistent with the provisions of the Hindu texts. I will readily concede, as indeed is obvious, that some of these changes may not be consistent with the views propounded by Vijnanesvara. But in discussing this problem it should never be forgotten that though Vijnanesvara is a renowned scholar of Hindu law and though his reputation as as enlightened commentator is justly deserved, he was nevertheless a commentator and it is clear that he was attempting to construe texts of Hindu law so as to bring them in conformity with the customs and popular beliefs in the area where he lived and at the time when he flourished. It is sometimes said by cynics about judicial decisions that by industry it would be possible to discover a judicial decision in support of any proposition of law whatever. I do not know if this criticism is justified ; but I feel certain that this statement would be substantially true about the ancient Sanskrit texts. During its long and chequered history

Hindu law has travelled for so many centuries that it is a matter for no surprise that we find during the growth of Hindu law different views expressed by different writers at different times. Therefore, it would be wholly unjustified to say that the provisions contained in the Hindu Code on the topics to which I have just referred do not find any spport in any *smṛti* text at all. I will illustrate my point by discussing briefly the four topics themselves.

As to divorce and judicial separation the step which the Hindu Code proposes to take has already been taken in the State of Bombay and in fact Courts of law have been administering the provisions of the Bombay Hindu Divorce Act, XXII of 1947. It is more than three years since the Act has come into operation and nobody in this State is likely to support the contention that similar provisions in the Hindu Code are either unjustified or undesirable. But apart from that, let us see what the position is under the texts themselves. I do not for a moment suggest that the provisions for the divorce of a Hindu marriage which are included in the Hindu Code can claim to receive consistent or uniform support from the Hindu texts. I am only concerned to show that similar provisions are found in some texts. This is what Parasara says: " If the husband be missing, or dead, or retired from the world, or impotent, or degraded, in these five calamities a woman may take another husband." And Devala agrees with Parasara because he says: " A husband may be forsaken by his wife, if he be an abandoned sinner, or an heritical mendicant, or impotent, or degraded, or afflicted with phthisis, or if he have been long absent in a foreign country." " Whether such a husband be alive or dead, his wife may take another lord, for the sake of obtaining progeny, not through female independence." And Devala actually proceeds to say how long a woman has to wait if her husband has gone abroad and he adds: " Eight years let a woman of the *dwija* class wait for her absent lord; or four years, if she have borne no children; after these periods she may unite herself to another man "; the period for a woman of the *kṣatriya* class is six years or three according as she has or has not borne her husband children, and that for a woman of the *vaisya* class is four or two years respectively. For the woman of the *sudra* class, however, no period is ordained and it is said that they do not violate their duty by an early second marriage; but for those who have borne no children the settled rule prescribes one year. Devala, however, took the precaution of making it clear that these periods are prescribed when there is no news concerning the absent husbands. If there is any news about them these periods must be doubled. I must, however, add that both Manu and Yājñyavalkya do not support this theory. Both of them agree in emphasising the sacramental character of marriage and both of them unequivocally

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say that a wife can never be released from her obligations to her husband, though they do not provide for a corresponding obligation against the husband. It is true that Manu, for instance, enjoins upon both the husband and the wife to be loyal to each other until death ; but whereas the failure of the wife to keep her husband's bed unsullied would according to Manu result in the abandonment of the wife, no such consequnce follows in respect of the husband even if he departed from the path of virtue. Polygamy was the privilege of man and he could marry any number of wives he liked ; but the woman had to remain a model of virtue content to obey and serve her lord, however improper may be his conduct. Yājñyavalkya does not make any improvement in this position. Both the *smṛtis* provide for the supersession of the wife in case she departed from the strict path of virtue and obedience, though Yājñyavalkya was somewhat compassionate to such a wife when he provided that even a superseded wife must be maintained ; otherwise a grave offence is committed by the husband (I-74). Incidentally I may refer to one verse from Manu which says : " She who is averse to her husband who is mad or is a deadly sinner, or a eunuch or without manly virility, or is afflicted with sinful diseases, must neither be deserted nor stripped of her property."* (IX-79). In other words, Manu would not have found fault with the wife if she had been indifferent to the husband of the type described in this verse. That is as far as Manu possibly could go.

Now, the texts of Parasara, Devala and Narada which are distinctly and unequivocally in favour of remarriage and which by necessary implication support divorce, are explained away by the commentators on the conventional doctrine of Kalivarja ; in other words, it is said that these customs which may have once prevailed must be discarded in the present age. This explanation, however, would not satisfy many people today. It may be that in the course of the development of Hindu law divorce and remarriage came to be discredited, if not altogether discarded, and there is no doubt that for centuries past divorce has not been recognised amongst the regenerate classes. Amongst the Sudras divorce by custom is recognised ; whether such a custom is valid or not is another matter. But the point which I wish to make is that it is not correct to say that in permitting divorce the Hindu Code makes an encroachment upon Hindu religion. As all of us are aware, remarriage was legalised nearly a hundred years ago and in legalising divorce and providing for it under specified conditions the Hindu Code is taking forward a step which is now overdue. In fact, as I have already mentioned, we have taken this step four years ago in the State of Bombay.

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* उन्मत्तं पतितं क्लीबमबीजं पापरोगिणम् ।
न त्यागोऽस्ति द्विषंत्याश्च न च दायापवर्तनम् ।। Manu. IX, 79.

Now, let us take the question of survivorship. Every student of Hindu law is aware that there are two schools of Hindu law, one is the Mitaksara school and the other is the Dayabhaga school. Under the Mitaksara law we have the familiar joint family, whose distinguishing feature is community of interest and unity of possession. Every member of the coparcenary has a right by birth in the property of the coparcenary. This right is not determined until partition is made; it is liable to fluctuations; it increases with every death in the family and decreases with every birth. The persons constituting the coparcenary own the property of the family as joint tenants with the right of survivorship and they leave the management of the family and its properties in the hands of the manager, who is clothed with some special powers. But even these special powers do not justify the alienation by the manager of the property of the family unless the transaction is supported by legal necessity. On the other hand, under the Dayabhaga system of Hindu law coparcenary properly so-called is unknown. The father is the absolute owner of the property so long as he is alive; his sons can claim no share in this property by their birth and on his death his property devolves by succession amongst his heirs, each one of whom takes his share as his separate and absolute property and all of whom together own the property not as joint tenants, but as tenants in common. As a necessary corollary, whoever holds the property can dispose of it as he likes without any restrictions. In this connection it would be interesting to study the birth and development of the doctrines which are associated with the name of Jimutavahana. It is often assumed that Jimutavahana for the first time inaugurated the departure from the prevailing law; but as Dr. Bhattacharyya in his "The Law relating to the Joint Hindu Family" has pointed out this assumption is not well-founded. "It would be unprecedented," said Dr. Bhattacharyya, "that a single author, however eminent, or a single work however well-reasoned, should have been capable of at once producing so vast a change." Dr. Bhattacharyya has referred to the history of Bengal and has suggested the theory that the germs of this doctrine were deducible from the current customs and practices in Bengal before Jimutavahana wrote his famous treatise. And if we examine the views of Jimutavahana in the light of the texts to which he refers and on which he has offered his comments, the thesis of the learned Doctor seems to be well-founded.

Jimutavahana discusses this topic at length in Chapter II. He starts with the verse of Yājñyavalkya in which it is stated that the father is master of the gems, pearls and corals and of all other movable property; but neither the father nor the grandfather is so of the whole

immovable property.* Then he refers to Manu's text in which Manu says that " the support of persons who should be maintained is the approved means of attaining heaven ; but hell is the man's portion if they suffer. Therefore (let a master of a family) carefully maintain them."† It would be useful I think if I cited at this place the comment of Jimutavahana in his own words :

" 24. The prohibition is not against a donation or other transfer of a small part not incompatible with the support of the family. For the insertion of the word 'whole' would be unmeaning (if the gift of even a small part were forbidden).

25. From the express mention of immovables, a prohibition is inferred by the analogy exemplified in the loaf and staff, against the gift or other transfer of a corrody or of slaves.

26. But, if the family cannot be supported without selling the whole immovable and other property, even the whole may be sold or otherwise disposed of : as appears from the obvious sense of the passage ; and because it is directed, that a man should by all means preserve himself.

27. It should not be alleged, that by the texts of Vyasa (" A single parcener may not, without consent of the rest, make a sale or gift of the whole immovable estate, nor of what is common to the family." " Separated kinsmen, as those who are unseparated, are equal in respect of immovables : for one has not power over the whole, to give, mortgage, or sell it), one person has not power to make a sale or other transfer of such property. For here also (in the very instance of land held in common), as in the case of other goods, there equally exists a property consisting in the power of disposal at pleasure.

28. But the texts of Vyasa exhibiting a prohibition, are intended to show a moral offence : since the family is distressed by a sale, gift, or other transfer, which argues a disposition in the person to make an ill use of his power as owner. They are not meant to invalidate the sale or other transfer.

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* मणिमुक्ताप्रवालानां सर्वस्यैव पिता प्रभुः ।
स्थावरस्य तु सर्वस्य न पिता न पितामह : ॥

† मरणं पोष्यवर्गस्य प्रशस्तं स्वर्गसाधनम् ।
नरकं पीडने चास्य तस्माद्यत्नेन तं भरेत् ॥

29. So likewise other texts (as this " Though immovables or bipeds have been acquired by a man himself, a gift or sale of them *should* not *be made* by him, unless convening all the sons," must) be interpreted in the same manner. For here the words " should " " be made " must necessarily be understood.

30. Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one. But the gift or transfer is not null : for a fact cannot be altered by a hundred texts."*

Now, the last sentence of this comment is very remarkable. Jimutavahana realised that it was somewhat difficult to claim that his thesis was consistent with all the texts in question. Therefore, as a last resort he categorically stated that a fact cannot be altered by hundred texts. Now, the Sanskrit word used by Jimutavahana is '*vastu*,' which may mean a thing, and his statement could be justified only on the hypothesis that the thing to which he referred was in effect the custom that prevailed in Bengal at the material time. In other words, Jimutavahana realised that in Bengal it was quite common for the father to sell ancestral immovable property without any objection, and

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* अल्पस्य तु कुटुम्बवर्त्तनाविरोधिनो न दानादिनिषेधः सर्वस्येत्यानर्थक्यापत्तेः ॥२४॥

स्थावरग्रहणात् निबन्धद्विपदयोर्दण्डापूपन्यायात् दानादिनिषेधसिद्धिः ॥२५॥

यदि पुनः सर्वस्थावरादिविक्रयमन्तरेण कुटुम्बवर्त्तनमेव न भवति तदा सर्वस्यापि विक्रयणादिकमर्थात् सिद्धयति। सर्वत एवात्मानं गोपायीतेति वचनात् ॥२६॥

न च स्थावरस्य समस्तस्य गोत्रसाधारणस्य च।
नैकः कुर्य्यात् क्रयं दानं परस्परमतं विना ॥

विभक्ता अविभक्ता वा सपिण्डाः स्थावरे समाः।
एको ह्यनीशः सर्वत्र दानाधमनविक्रये ॥

एतद्व्यासवचनद्वयेन एकस्य विक्रयाद्यनधिकार इति वाच्यं यथेष्टवियोगार्हत्वलक्षणस्य स्वत्वस्य द्रव्यान्तर इवात्राप्यविशेषात् ॥ २७ ॥

व्यासवचनन्तु स्वामित्वेन दुर्वृत्तपुरुषगोचरविक्रयदानादिना कुटुम्बविरोधात् अधर्मभागिताज्ञापनार्थं निषेधरूपं न तु विक्रयाद्यनिष्पत्त्यर्थम् ॥ २८ ॥

एवञ्च

स्थावरं द्विपदञ्चैव यद्यपि स्वयमर्जितम् ।
असम्भूय सुतान् सर्वान् न दानं न च विक्रयः ॥

इत्येवमादिकं तदप्येवमेव वर्णनीयम् ।
तथाहि कर्त्तव्यपदमवश्यमत्राध्याहार्य्यम् ॥२९॥

तेन दानविक्रयकर्त्तव्यतानिषेधात् तत्करणात् विध्यतिक्रमो भवति न तु दानाद्यनिष्पत्तिः वचनशतेनापि वस्तुनोऽन्यथाकरणाशक्तेः ॥३०॥

(Dayabhaga, II, 24-30)

Jimutavahana naturally wanted to bring that practice within the framework of Hindu law. In fact, this part of Jimutavahana's reasoning shows that he was attempting to adapt and adjust the principles of Hindu law to the changed and altered practices that had become popular in Bengal.

It is very interesting to refer to a passage from Mitaksara to illustrate how Vijnanesvara himself made a valiant effort to bring the customs and usages of his time in conformity with Hindu law. In dealing with the question as to the respective rights of the father and son in the ancestral property Vijnanesvara has said that the subject of ownership is a temporal matter, which has been construed by Dr. Bhattacharyya as meaning that the subject of ownership must be determined by reference to the customs and usages observed by people at large. In other words, at the time when and in the territory where Vijnanesvara lived the popular usage and custom had clothed the sons with the right in the ancestral property by reason of their birth. Mitramisra in fact expressly says so. " The Smṛti texts," observes Mitramisra, " relating to litigation are but the repetitions of what prevails among the people; this has been so said by all the writers of treatises."*

Now, if we look at the texts themselves it would be perfectly correct to say that there are texts which support the views of both Mitaksara and Jimutavahana. The text of Devala unequivocally supports Jimutavahana because Devala says : " The father being dead, the sons should divide the father's wealth—since there cannot be ownership in them, while the father is living, being faultless."† On the other hand the text of Gautama emphatically supports the Mitaksara view, for Gautama says : " From the very moment of birth, one obtains the ownership of the wealth,—thus say the authorities."‡ The material text of Manu reads thus : " After the father and the mother, the brothers having assembled together,—should divide the paternal inheritance ;—since they are not the lords,—while those two live."§ Vyasa

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* प्रायेण व्यवहारस्मृतीनां लोकसिद्धार्थानुवादकत्वमिति सकलनिबन्धृभिरभिधानात् । (Viram. Chap. I, see 37).

† पितर्य्युपरते पुत्रा विभजेयुर्धनम्पितुः ।
अस्वाम्यं हि भवेदेषां निर्दोषे पितरि स्थिते ॥

‡ उत्पत्त्यैवार्थस्वामित्वं लभते इत्याचार्याः ।

§ ऊर्ध्वं पितुश्च मातुश्च समेत्य भ्रातरः समम् ।
भजेरन्पैतृकं रिक्थमनीशास्ते हि जीवतोः ॥

Manu. IX, 104.

says : " Of the immovable property, and the slaves, although acquired by one's own self,—there is neither a gift, nor a sale, without assembling all the sons. Those who are born, those who are unborn, and those who are lying in the womb,—they wish for subsistence. There is neither a gift, nor a sale."* Yājñyavalkya is emphatically in favour of Mitaksara for he says : " The land appropriated by the grandfather, or corrody, or property—therein the ownership of both the father and the son, should be alike."† No wonder that whereas Jimutavahana based his thesis on the text of Devala, Vijnanesvara took Yājñyavalkya and Gautama for his guidance. The comments which Jimutavahana has made on the text of Vyasa undoubtedly support the conclusion of Dr. Bhattacharyya that in all probability Jimutavahana wanted to confine the absolute and unrestricted power of alienation of the father to his self-acquired property. In other words, Dr. Bhattacharyya takes the view that Jimutavahana perhaps did not want to go as far as he has been understood to have gone by the later decisions of Indian Courts. However that may be, the point which I wish to make is that even though Dayabhaga and Mitaksara differ radically in their treatment of joint family property, each one of them propounds the thesis that his view is based upon ancient Hindu texts. If that is so, it would be difficult to justify the criticism against the Code that in abolishing survivorship and its inevitable incidents the Code is making a violent departure not supported by Sanskrit texts. Texts there are in support of either view and it is for us today to consider which view would serve the social interests best.

While I am dealing with this question of survivorship I may incidentally point out that some scholars are of the opinion that ancient Hindu law did not make any distinction between ancestral and self-acquired property. The expression " paternal estate " which is frequently used in Hindu texts does not, according to this view, mean the father's self-acquisition alone ; but merely means the estate which the son can inherit or obtain through his relation as such son to his father. According to Manu three persons including a son can have no wealth of their own so long as their superior is alive. Harita Smṛti also takes the same view. It is true that Vijnanesvara has pressed into service the

* स्थावरं द्विपदञ्चैव यद्यपि स्वयमर्ज्जितम् ।
असम्भूय सुतान् सर्वान् न दानं न च विक्रयः ॥

ये जाता येऽप्यजाताश्च ये च गर्भे व्यवस्थिताः ।
वृतिञ्च तेऽभिकांक्षन्ति न दानं न च विक्रयः ॥

† भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा ।
तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चोभयोः ॥

text of Gautama in support of his theory of right by birth. The genuineness of Gautama's text itself is, however, disputed by these scholars and according to them even if the text is treated as genuine, all that it really means is that by his birth a son gets an inchoate and contingent right to inherit to his father or mother on their death and not a right *in praesenti*. In fact, there are several passages in ancient texts which show that ownership in immovable property could not validly pass unless the consent of neighbours and even the whole village was obtained. In other words, the unrestricted right of private ownership coupled with the right of alienation in immovable property received no encouragement in the ancient Sanskrit texts. This view has the support of Mr. Justice Sadasiva Ayyar who in *Srinivasa Iyengar* v. *Thiruvengada Thaiyangar*, I.L.R. 38 Mad. 566, has examined the doctrine of survivorship enunciated by Mitaksara and has come to the conclusion that in ancient Sanskrit texts the son was never considered as the true owner of any property so long as his father or mother was alive. He has also pointed out that the modern interpretation of the Mitakasara rule of right by birth was in hopeless conflict with the son's undoubted legal liability under the ancient Hindu law to pay his father's debts and hence the Privy Council have been obliged to virtually destroy this rule by allowing the validity of alienations effected to discharge the father's debts provided they are not illegal or immoral. Sadasiva Ayyar J. has also expressed the opinion that this rule has virually killed the numerous texts which show that the great-great-grandson has no right to inherit directly the property of his great-great-grandfather if the great-great-grandfather at his death left nearer descendants. The learned Judge has almost in despair cited with approval the bitter comment made by Mr. Justice Beaman in these words :

> " There seems now little hope of expecting from the vast entanglements of the Mitakshara Hindu law, anything like consistent principles, or intelligible classifications, and every single rule seems to be open to innumerable exceptions, many of which appear to conflict in principle with the main rule."

I wish to add with respect that I feel inclined to agree with the conclusions of Sadashiva Ayyar J. It is, therefore, necessary to remind the students of Hindu law that too much and unqualified insistence on the Mitaksara doctrine of right by birth and survivorship is not justified having regard to all the material texts of Hindu law.

Let us then take the question of the daughter's share in the property of her father. On this point again two distinct tendencies are clearly discernible in the ancient Sanskrit literature dealing with this question.

The protagonists of the view that the daughter must be excluded can take comfort from the thought that their view receives the support of a passage from the Ṛgveda itself. The famous 31st hymn in the third Mandala of the Ṛgveda as explained by Sayana provides : " The son does not vacate the inherited wealth for his sister ; he makes her the repository of the issue of him who takes her; alothough the parents procreate both the males and the females ;—the one is a worker of good deeds; the other is graceful."* In the ancient Vedic times where strife and struggle were the order of the day, it is not surprising that the warrior should have monopolised succession to the estate and the female should have been treated as merely the repository of the issue of him who takes her. I do not want to multiply quotations on this subject because it is not my intention to examine these questions at length. I would, therefore, content myself by mentioning that both Manu and Yājñyavalkya do not seem to subscribe to this unqualified and absolute prohibition against the daughters' claims to succeed to a part of their fathers' estate. Manu in Chapter IX, verse 130, says : " Just as a person is born through his son, so is he through his daughter ; the daughter and the son are therefore equal. If the daughter is alive, how can anyone else take away the estate of the father ?"† Verse 118 in the same chapter says : " To the maiden sisters let their brothers give portions out of their allotments respectively ; to each one-fourth part of the appropriate share. Those who refuse to give shall be degraded."‡ Yājñyavalkya in Chapter II, verse 127, says : " And sisters should be initiated into marriage giving them the fourth part of one's own share."§ It is somewhat remarkable that though the Dayabhaga school is of later growth than the Mitaksara, the views of Dayabhaga on this question are more retrograde than those of Mitakasara. In commenting on verse 127 of Yājñyavalkya, Vijnanesvara noticed a contrary view and severely criticsed it. Let me reproduce the words of Vijnanesvara himself :

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* न जामये तान्वो रिक्थमरैक्
चकार गर्भं सनितु र्निधानम् ।
यदि मातरो जनयन्त वन्हिम्
अन्यः कर्त्ता सुकृतोरन्य ऋन्धन ।। ऋग्वेद, तृ. मंडल ३१.

† यथैवात्मा तथा पुत्रः पुत्रेण दुहिता समा ।
तस्यामात्मनि तिष्ठन्त्यां कथमन्यो धनं हरेत् ।। (Manu. IX, 130)

‡ स्वेभ्योंऽशेभ्यस्तु कन्याभ्यः प्रदद्युर्भ्रातरः पृथक् ।
स्वात्स्वादंशाच्चतुर्भागं पतिताः स्युरदित्सवः ।। (Manu. IX, 118)

§ असंस्कृतास्तु संस्कार्या भ्रातृभिः पूर्वसंस्कृतैः ।
भगिन्यश्च निजादंशाद्दत्वांऽशं तु तुरीयकम् ।। (Yaj. II, 12)

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" If it be said, that ' here also, the speaking of the fourth share is not intentional—that the real intention is to declare the payment of only as much wealth as is requisite for the sacrament of marriage, ' this is not so. Because there is no authority for saying that both the Smṛtis (Manu and Yājñyavalkya) have spoken of the fourth share to be given, without really meaning the same ; and because we hear also of there being a sin in case of non-payment. " (Ch I, sec. 7, para. 11).*

" Therefore after the death of the father, the unmarried daughter also is entitled to a share ; before, however, (*i.e.*, before the father's death), whatsoever the father gives, she gets,—since there is no special text. Thus everything becomes unobjectionable. " (Para. 14).†

And now see what Jimutavahana has to say on this subject :—

" Where the property is small, the sons, taking out of each of of their respective shares, should give the unmarried daughters one-fourth share. As says Manu, ' From their own shares should the brothers give severally to the unmarried daughters, one-fourth share form each of their own respective shares ;—unwilling to give, they should become fallen (*i.e.* degraded)." (Ch. III, sec. 2, para. 36)

" As we are hearing here of a gift, in the expression ' should give, ' and of degradation in case of not giving, the unmarried daughters should not take with the idea that they had a right ; for to a brother who has a *right*, another brother does not *give*." (Para. 37).

" As says Yājñyavalkya. ' Those not religiously initiated should be initiated by brothers previously initiated ; and sisters also ; giving however, one-fourth share from the self-appropriated share '. He is speaking of the indispensableness of initiating the unmarried daughters ; (which, in the case of women, means marrying) ; not of their right. "(Para. 38).

" And thus where there is much wealth, wealth requisite for the marriage should be given ; there is no invariable rule for one fourth share. This is the conclusion. " (Para. 39).

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* अत्रापि चतुर्भागवचनमविवक्षितं संसारोपयोगिद्रव्यदानमेव विवक्षितमिति चेन्न । स्मृतिद्वयेऽपि चतुर्थांशदानविवक्षायां प्रमाणाभावाददाने प्रत्यवायश्रवणाच्चेति । (Mit. I, 7. 11.)

† तस्मात्पितुरूर्ध्वं कन्याऽप्यंशभागिनी पूर्वं चेद्यत्किंचित्पिता ददाति तदेव लभते विशेषवचनाभावादिति सर्वमनवद्यम् ॥ (Mit. I, 1.14.)

"And the above is to be understood in the case of there being an equality in the numbers of sons and unmarried daughters; in the case of the number being unequal, either there should be a great deal of wealth come to belong to the daughter, or there should come about an impecuniosity of the son; and that is not right, for the superiority belongs to the son." (Par. 40).*

I would only like to add respectfully that I agree with Dr. Bhattacharyya's criticism against the argument of Jimutavahana that it is an extraordinary instance of special pleading.

This discussion would show that whereas Mitaksara was prepared to go a long way in recognising the daughter's right to a share in the property of her father, Jimutavahana was reluctant to do so. And if one assumes, as one may, that though in ancient times the females were assigned an inferior status, that view gradually changed in course of time. It is difficult to understand how Jimutavahana who came much later than Vijnanesvara should have gone back to the earlier view in preference to the view so forcefully expressed by Vijnanesvara himself. The only explanation which can be offered is that the local customs and usages in Bengal were not consistent with the Mitaksara view.

Now let us consider the position of the texts as to the nature and extent of the rights of women over property obtained by them. There is no doubt that the texts of Yājñayavalkya and Visnu which recognise the rights of the widow, the daughter, the mother and other females as heirs do not make any distinction between the character of the estate taken by them and that of the estate taken by the male heirs. The words used in reference to both the estates are the same, and reasonably

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* अल्पधने पुत्रैः स्वात् स्वादंशादाकृष्य कन्याभ्यश्चतुर्थोऽशो दातव्यः यथा मनुः ।

स्वेभ्योंऽशेभ्यस्तु कन्याभ्यः प्रदद्युर्भ्रातरः पृथक् ।
स्वात् स्वादंशाच्चतुर्भागं पतिताः स्युरदित्सवः ॥३६॥ (मनु ९ । ११८)

प्रदद्युरिति प्रदानश्रुतेरदाने च पतितत्वश्रुते र्न कन्याभिरधिकारिबुद्धया ग्रहीतव्यं न ह्यधिकारिणे भ्रात्रेऽपरो भ्राता स्वादंशाद्ददाति ॥३७॥

यथा याज्ञवल्क्यः ।

असंस्कृतास्तु संस्कार्य्या भ्रातृभिः पूर्वसंस्कृतैः ।
भगिन्यश्च निजादंशाद्दत्त्वांशन्तु तुरीयकम् ॥ (याज्ञवल्क्य २ । १२५)
भगिनीनां संस्कार्य्यतामाह नाधिकारिताम् ॥३८॥

एवञ्च बहुतरधने विवाहोचितधनं दातव्यं न चतुर्थांशनियम इति सिद्धयति ॥३९॥

एतच्च कन्यापुत्रयोः समसङ्ख्यत्वे ज्ञातव्यं विषमसङ्ख्यत्वे च कन्याया एव बहुतरधन वा स्यात् पुत्रस्य वा निर्द्धनता स्यात् न चेतदुचितं पुत्रस्य प्राधान्यात् ॥ ४० ॥

(Dayabhaga III, 2,36-40)

construed they do not justify the distinction made by judicial decisions between the two estates. The same is the position with regard to the text of Bṛhan-Manu which says that the widow of a childless man, keeping unsullied her husband's bed and persevering in religious observances shall present his funeral oblation and obtain his entire share. On the other hand both Katyayana and Narada seem to negative the absolute estate of the woman. Katyayana says : " The childless widow preserving unsullied the bed of her lord, and abiding with her venerable protector, should enjoy with moderation the property until her death. After her the heirs should take it."* Likewise this is what Narada says : "Women are not entitled to make a gift or sale; a woman can only take a life-interest, whilst she is living together with the rest of the family such transactions of women are valid when the husband has given his consent, in default of the husband, the son, or in default of the son, the king. She may, enjoy or give away goods according to her pleasure except immovables, for she has no proprietary rights over the fields and the like." I have already referred to the fact that Mitaksara treated this problem in a very generous manner. Indeed, the view propounded by Mitaksara was so advanced that it may legitimately be claimed that at the time when he propounded it, the women's rights even under the English law were not as generously recognised. According to Mitaksara all kinds of property in the hands of a female, howsoever it my have been obtained by her, is her absolute property. The text of Yājñyavalkya on which Vijnanesvara has biult this theory is in these terms : " Whatever is given by the father, the mother, the husband and the brother and whatever is obtained near the nuptial fire and at the marital procession and the rest is known as *stridhana*."† The word *ādyam* has been interpreted by Vijnanesvara as including all other kinds of property which a woman may obtain. Vijnanesvara puts his thesis succinctly by emphasising that the word *stridhana* is used in its literal sense and not in its technical sense. This interpretation of Vijnanesvara is consistent with his view that women are entitled to inherit. Curiously enough, Dayabhaga did not accept the liberal interpretation of Vijnanesvara. According to Dayabhaga the property inherited by a widow from her husband is not her absolute estate, and it must be conceded that the Courts in India have in effect imposed the Dayabhaga view on the followers of the Mitakashara school. I am aware that the view taken

* अपुत्रा शयनं भर्तु: पालयन्ती गुरौ स्थिता ।
भुञ्जीतामरणात्क्षान्ता दायादा ऊर्ध्वमाप्नुयु: ।। कात्या. ९२१.

† पितृमातृपतिभ्रातृदत्तमध्यग्न्युपागतम् ।
आधिवेदनिकाद्यं च स्त्रीधनं परिकीर्तितम् ।।

by Dayabhaga receives support from some of the treatises under the Mitaksara school ; but the point which I wish to make is that the expansion of the scope of woman's property which had been made by Vijnanesvara by his clever interpretation of the word *ādyam* has really gone by the board in view of the decisions of the Privy Council on this point. Even so, it is prefectly legitimate to say that if the Hindu Code seeks to make woman's property absolute, it is merely harking us back to what Vijnanesvara did in his Mitaksara.

While I am dealing with this question I may incidentally refer to an important aspect of the daughter's rights in the property of her father. Even under the schools of Hindu law which do not admit a daughter to a share in the property of her father it is well recognised that at a partition between the members of the joint family provision has to be made for th e maintenance and marriage expenses of the daughter. Scholars are divided as to the genesis of this right. One view is that the provision for the maintenance and marriage expenses of the daughter have to be made because the father is liable to maintain all his children and he is bound to get his daughter married before she reaches her puberty. On the other hand, this view is not accepted by a large number of scholars of Hindu law who think that the better reason for this rule is really the historical remnant of her larger right. Mr. Justice Ramesam in his celebrated judgment in *Subbayya* v. *Ananta Ramayya*, I.L.R. 53 Mad. 84, has examined this question critically and has accepted the latter view. According to the learned Judge under the early Hindu law the rights of both the sons and daughters were imprefect rights in the property which could not be materialised by compelling partition against the wishes of the father. Gradually, however, the sons' right developed into a right to compel partition, whereas the daughters' right first became a right to compel partition against the brothers only and not against the father and later on degenerated into merely a right to maintenance and marriage expenses. In other words, a study of the historical development of this branch of the Hindu law shows that it is wholly inaccurate to say that daughters were always treated as being inferior to the sons under Hindu law. It may be that for some centuries past their rights have gradually decreased and now have crystallised into a claim merely for maintenance and for marriage expenses. But this was not so at an earlier stage, and if the Hindu Code seeks to confer upon the daughter somewhat larger rights than she enjoys today, it can well be claimed that the Hindu Code has in that behalf the authority of ancient Hindu texts.

I have taken these four topics for special consideration because I wish to emphasise the fact that the departures introduced by the Hindu

Code on these four points cannot be condemned as being absolutely inconsistent with all the texts of Hindu law. Therefore, I would ask you to consider these provisions on their merits. If they appear to you to be sound and just you should support them wholeheartedly.

Indeed, the principal point which I wish to emphasise is that the Hindu Code should be considered rationally and scientifically on its own merits. I have endeavoured to show that it is an illusion to entertain the belief that Hindu law has never changed or that it is of divine origin. Hindu law has changed from time to time, though the method adopted in introducing these changes was somewhat unusual. I have also endeavoured to show that during the British rule Hindu law tended to be static and by reason of the infirmity from which the Courts suffered its further growth was inevitably arrested. Attempts were made from time to time to meet the crying need for reform on some special parts of Hindu law ; but the time has now come when the problem must be attacked boldy and fearlessly and the whole of the Hindu law must be put on a rational basis. The first and obvious point on which there could be no difference is that the personal law which affects the lives of so many millions of Hindus should be made simple, clear and certain and this object can be achieved only by codifying the whole of the Hindu law. I suggest that there should be no difference of opinion that the personal law affecting all the Hindus should now be made also uniform. The most objectionable feature of the Hindu law is the division of the Hindu community amongst four *varnas*. No argument is necessary in support of the proposition that these *varnas* have now become totally obsolete. It may be that historically speaking the orign of these *varnas* may not have been so much religious as political and it may be assumed for the sake of argument that the system of these *varnas* may perhaps have served some purpose in primitive times. But in the present age of India's freedom it is inconceivable that any Hindu should stand up for the division of the Hindu community into four *varnas* which are arranged on the basis of a hierarchical importance and superiority. We all take glory in the fact that we are living in the present historical times. The Constitunent Assembly has given the nation the Constitution of which the nation is proud. A revolution has been worked out in the history of this country and each one of us is feeling the throb of the new and free life. It seems to me that it is the peremptory requirement of the present age that we must have a Hindu Code which is based on absolute equality amongst all Hindus, irrespective of their caste, creed or sex. If we are all agreed on this elementary proposition, there must be unanimity amongst us all in bringing about this reform. I have already mentioned how the Hindu law as it is administered today by our Courts treats the important communities in

the State of Bombay such as the Marathas and the Lingayats on a basis which is inconsistent with their self-respect. Now, if this position has to be altered Courts of law would not be able to afford much assistance because they are bound by texts that are regarded as of paramount authority and in the matter of customs they are bound by the rules of the Evidence Act which make the proof of customs somewhat difficult. The only feasible way of bringing about this urgent reform is to legislate and if you legislate you must legislate on an all India basis on such an important topic. The position of women under the Hindu law as it is administered today calls for a similar change. As I have already mentioned texts can be cited in support of the women's claims as much as against them. But I venture to suggest that the days when texts had the final voice in such matters have long gone by, never to return. We may and should study the ancient Sanskrit literature in order to reconstruct our history from a critical point of view. Indeed, the ancient Sanskrit texts constitute a proud heritage for us. But it would be totally unscientific and unreasonable to go back to these ancient texts to find out how we should regulate our daily life today. I do not think anyone can seriously support the view that women should be treated as being inferior to men in the matter of personal law. Indeed, such a claim would be obviously inconsistent with the fundamental rights guaranteed by our new Constitution. Let me emphasise with all the force at my command that today it is of paramount importance to have uniformity of Hindu law. Some of the immediate results of the impact of political freedom have been very disappointing and they have caused dismay and anguish to all thoughtful citizens. The sense of unity which bound the nation together in its struggle against the British rule seems today in grave danger; separatist tendencies in different garbs and forms are raising their ugly heads. It is therefore the duty of all enlightened and patriotic citizens to be on their guard against these fissiparous tendencies. The test of wise statesmanship lies in co-ordinating the larger patriotism and loyalty for the Union of India with the smaller loyalties for groups or provinces. In the present stage of our development and growth as an independent and free nation it would be unwise to seek to supplant or annhilate altogether these smaller loyalties. From this point of view and in the context of today it seems to me that one common Hindu Code will forge a precious bond of unity amongst the Hindus and to that extent one big step will have been taken. It would indeed be a proud day in the history of Hindu society if under the Hindu Code all Hindus are closely knit into one brotherhood of equals governed by the same law—irrespective of caste, creed, varna or sex.

There are many common features of Hindu law even as it is administered today. It is true that on some points of importance different schools take different views ; but I strongly feel that time has arrived to consider these points of difference, evolve common principles which are just, fair and reasonable and make them applicable throughout the country. Under all the schools we have virtually two parallel provisions applicable to the twice-born classes and the Sudras; this feature of Hindu law is based on a system of life which is obsolete and which is thoroughly obnoxious. Let us realise that freedom and equality do not operate only in some departments of human affairs ; they must permeate the whole and entire social life and outlook. If freedom and equality are the very basis of our Constitution, it behoves us all, each one in his or her own way and in his or her own sphere, to assist the enforcement of these prinicples in all matters, educational, religious, political, cultural and economic. From this point of view I consider the Hindu Code as constituting a big step forward in implementiing the promise given to the nation by its Constitution of introducing a new era of equality and liberty in free India. I have deliberately refrained from dealing with the arguments advanced by some critics that the Government should come out with a civil code common to all citizens, because examination of the said argument would involve consideration of the provisions of the Constitution which is outside the ambit of the present lectures. I would, however, point out that the Constitution has by Article 44 recognised as a directive principle that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. However, let me remind you that those who are against any legislation in matters of personal law are not consistent in their objections. If Legislature takes up piecemeal legislation the opponents insist on a comprehensive legislation ; if an attempt is made as now to introduce a comprehensive Code, the opposition is on the ground that it is not comprehensive enough because it is applicable to the Hindus alone. If you feel that the Hindu Code is a big step forward in the right direction, I have no doubt that you would be content with taking one big step at least for the prssent. If this big step is taken now, it would in due course lead to the final step contemplated by the Constitution whereby one civil code would govern all the citizens of the Union of India. I think it would be very unwise not to support the Hindu Code on the idealistic ground that its provisions do not embrace all citizens alike. I apprehend this attitude may not expedite the final unification of all civil laws in the country, but would merely postpone even the unification of Hindu law.

Curiously enough though all of us pay homage to the doctrine of equality amongst all communities and between persons of both the

sexes, sharp differences arise when you think of applying this doctrine to the personal law. Now, take the case of the Mitaksara joint family by which some people swear. It may be that the Mitaksara system did serve a useful purpose at some time. In days when political and social stability was unknown, large families may have chosen to cling together for self-preservation, and when it was customary for joint families to carry on the same trade, profession or avocation from generation to generation the mischief of this system may not have worked or may not have been noticed. But today this system is clearly obsolete and acts more as a hindrance than help to social progress. I think I need not make any apology for quoting from the observations made by that eminent lawyer and jurist from Madras, Mr. S. Srinivas Iyengar. " The present attenuated rules governing a Mitaksara coparcenary," he said, " do not protect the joint family in the enjoyment of its property but operate only as a hindrance to its economic efficiency. Right by birth and survorship, and the restrictions imposed by them on the power of alienation and the deprivation of the right of succession of those who are nearer and dearer to a deceased male member than a coparcener, are all outworn indicia of the ancient type of family which has become almost extinct. The large urban life of these days, the consequent separation of the members of the family and their employment or avocations in distant parts of the country and above all the new ideas of individuality and the consequent conflicts in the aims and aspirations of the various members of the family have resulted in the emergence of the modern Hindu family which is both in actuality and in sentiment far removed from the spirit and purpose, the area and the ideals of the ancient joint family system."* I have no doubt that lawyers and Judges and those who may have been dragged to the Courts of law as litigants will find no difficulty in agreeing with the observations of Mr. Iyengar. In fact, it is no exaggeration to say that this branch of the Mitaksara law and the law of adoption have been the largest sources of litigation in modern times and can be aptly described as a paradise for the lawyers. In this connection it is also necessary to remember that the Hindu Gains of Learing Act, for which the Rt. Hon'ble Dr. Jayakar was responsible, has already made a serious encorachment on the strict Mitaksara view of the joint family. This law has been on the Statute Book for several years past and those of us who have seen the working of this Act feel that time has now arrived when the Mitaksara view of the joint family should be radically changed so as to make the Hindu law in that behalf more consistent with modern conditions. Let me illustrate the mischief which results from the application of the orthodox view of Hindu law in this behalf. Sometimes the doctrine of Mitaksara

* (Report of the Hindu Law Committee, 1947, pp. 16-17.)

works great hardship. Take for instance a case of a joint family consisting of four brothers. If these brothers die, the widows of three of them who die first would be entitled merely to maintenance under the strict letter of the orthodix view, whereas the widow of the last surviving coparcener would succed to the estate. This result is obviously unjust. Similarly, if out of two undivided brothers one dies leaving behind him his daughter, she would get no share under the orthodox view of Hindu law, but the daughter of the survivor would get the estate solely because her father was the last to die. It appears that Government have agreed to modify the first proposals so as to compromise with the views of the Opposition. If I may say so with very great respect, I think much of the merit of the original proposals may be lost if this compromise is ultimately accepted. I agree that these proposals should not be put on the Statute Book if they encounter very strong opposition ; but if the principle underlying these proposals is of paramount importance, as I think it is, I venture to think it would be inexpedient to compromise on this matter of principle.

There has been similar opposition to the share which is proposed to be given to the daughters, both married and unmarried, and to the proposal to alter the character of woman's property. In the State of Bombay the position of Hindu women is undoubtedly much better than in rest of India. In Bombay females who get property of the family of their birth own their property as absolute owners. The same privilege will now be conceded to the females who acquire property belonging to their families by marriage in Bombay and it will be conceded to all females in the rest of India after the Code is passed. Several arguments were urged before the Rau Committee against this proposal, and they have been closely examined in the report. It is said that if the daughters are given a share it will cause rupture of the family and disaffection in the minds of the brothers. It is also urged that women in this country are ignorant and it is no good giving property to them which may be dissipated or wasted. All these arguments do not appear to me to be sound or convincing. Unfortunately a large percentage of women in this Country are ignorant and illiterate ; but many men who are possessed of considerable properties are also not literate or educated. In discussing this problem it may be worthwhile to remember that the right of women to succeed to the property is recognised in all the other systems of civilised jurisprudence and in fact this recognition was given even by some of the ancient Sanskrit texts. It is often argued by the opponents of these proposals that they confer on daughters double rights of succession—one in the family of their birth and the other in the family they join by marriage. But this so-called double right can work no hardship because if daughters take away their share from their

families by birth daughters-in-law will bring their share after marriage. I would, therefore, respectfully suggest that time has come when the Hindu law should be changed so as to conform to the present consciousness of Hindu society.

Let me make it clear that it is not my object to deal in detail with all the proposals contained in the Hindu Code or to ask you to accept my views on such of the proposals as I have discussed. I also wish to emphaise that I do not at all claim that the few thoughts which I have expressed during the course of these two lectures are either new or original. Indeed, I venture to flatter myself with the belief that these thoughts would be echoed by all fellow-students of Hindu law and all social reformers in the country. Let me remind you that I am not at all asking you to support all the proposals contained in the Code. I am only urging you to consider them on their merits. I do, however, request you to support the main idea of one Code for all Hindus in this country. In conclusion let me appeal to you to consider this problem rationally and in the spirit of scientific inquiry. I agree that it may be undesirable to overlegislate or to legislate hastily or far in advance of the social conscience. On the other hand, it is wholly undesirable to allow the personal law to remain far behind the social conscience either. From time to time as popular customs, usages and beliefs change the lag between them and the personal law must be abridged, if law has to remain alive, dynamic and useful for social progress. We are living in days when the old religious view of life would serve no purpose and it is our duty to discard it. We must distingusih between the religious and the philosophic part of the ancient Sanskirt texts and the part that deals with the secular or positive law and we must realise that this positive law has never remained steady or static. The work which was done on the whole admirably by the commentators must now be continued and completed by our legislators. Unfortunately the Hindu Code has not been discussed by the lawyers and students of Hindu law as much and as fully as it should have been and my whole object in coming down to this place to deliver the present lectures is to persuade you to devote your time and your thought to the consideration of the proposals contained in the Hindu Code. It is no exaggeration to say that these proposals affect all of us fundamentally and it is our duty to consider them dispassionately and without entering into any heated or acrimonious controversies. The Act is still on the

anvil of the Legislature and it is the duty of all Hindu citizens to express their views so as to enable the legislators to find out what response these proposals have evoked amongst the intelligent and educated Hindus. After all it would be the concern of the legislators to take into account the popular feeling on this subject and it is my fervent hope and prayer that the students of the Karnatak University as well as the lawyers and educated citizens of Karnatak should take active part in educating public opinion on the merits of the Code.

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